SUPREME COURT, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1252

ROGER D. BRANIGIN EDWIN M. S. STEERS
THURMAN M DeMOSS
As Members of the State
Election Board of Indiana,
~~JOSEPH W. SUMMERS~~,
~~NELSON G. GRILLS~~,

Appellants,

v.

DOROTHY C. DUDDLESTON,
JOHN J. GALLAGHER, MILES H. MARSHALL,
LOUIS Y. MUNDY,

Appellees.

Appeal from the United States District
Court for the Southern District of Indiana

STATE ELECTION BOARD'S STATEMENT AS TO JURISDICTION

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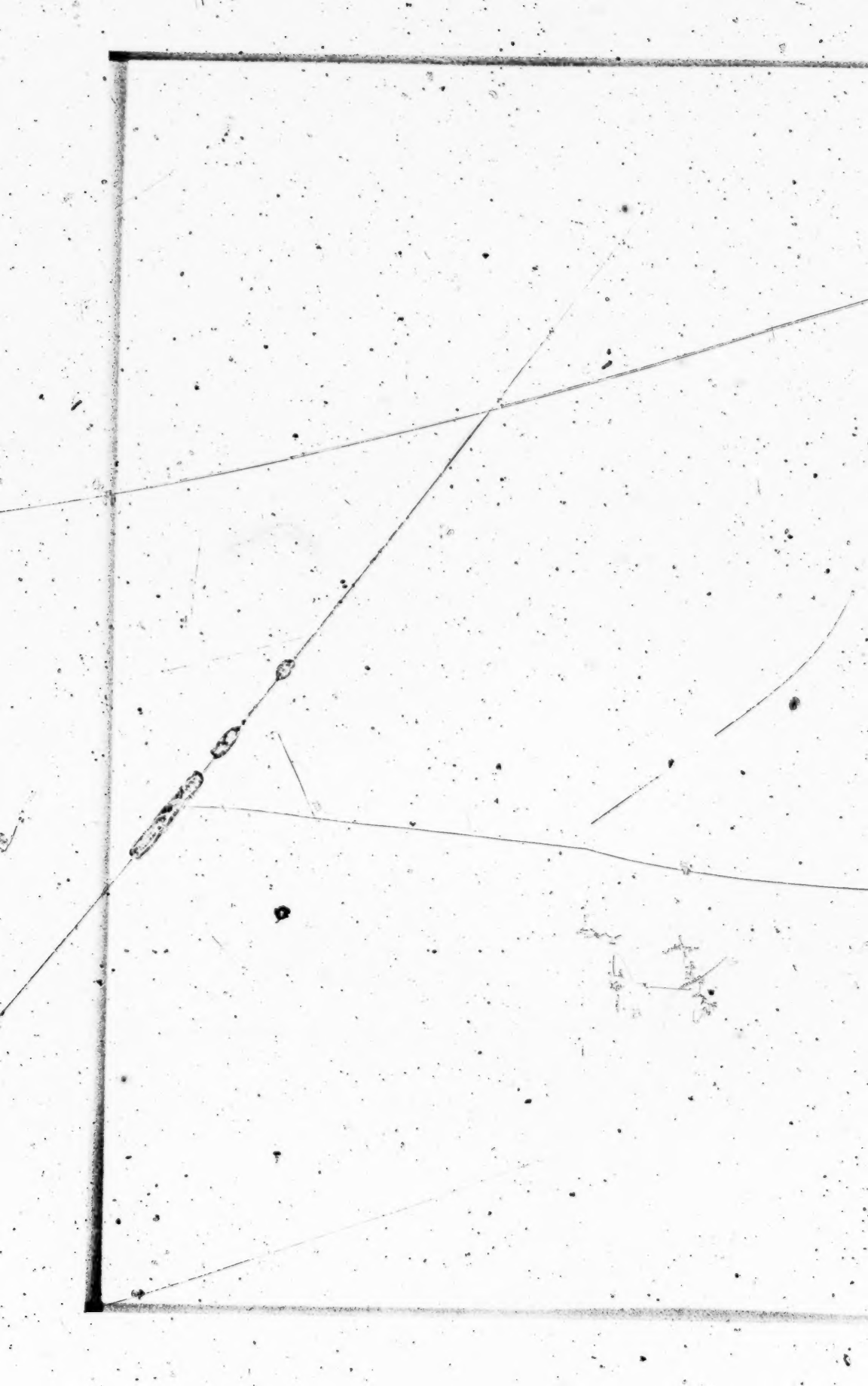

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STATE ELECTION BOARD'S STATEMENT AS TO JURISDICTION

The appellants Branigin, et al.,

members of the State Election Board of Indiana,

pursuant to United States Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment and decree of permanent jurisdiction in question, and should exercise such injunction in this case.

OPINIONS BELOW

Neither the majority opinion of the three-judge District Court containing the decree or judgment appealed from, nor the dissent thereto, is yet published. Copies of those opinions are attached to this jurisdictional statement as Appendices B and C. The opinions from which the prior appeal of this case arose are reported as Grills, et al. v. Branigin, et al., 255 F. Supp. 155 (1965). The Supreme

Court's per curiam order which terminated the first appeal (by vacating that judgment and remanding the case for further consideration) is reported as Duddleston, et al. v. Grills, 385 U.S. 455.

JURISDICTION

The appeal herein is from orders, judgments and decrees made and entered February 14, 1968, as a part of an opinion (Appendix B) signed by two of the three judges sitting as the United States District Court for the Southern District of Indiana, Indianapolis Division, specially constituted under 28 U.S.C. §§ 2281 and 2284 upon petitions to the Court to order election of Congressmen from districts to be drawn by the Court following earlier invalidation by that court on February 7, 1967 (Appendix A) of districts drawn by state legislative

enactment. The judgment appealed from created new Congressional districts and ordered the State Election Board (appellants) to conduct the election of Congressmen pursuant thereto.

The judgment appealed from was made and entered February 14, 1968. Notice of appeal was filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, on February 16, 1968.

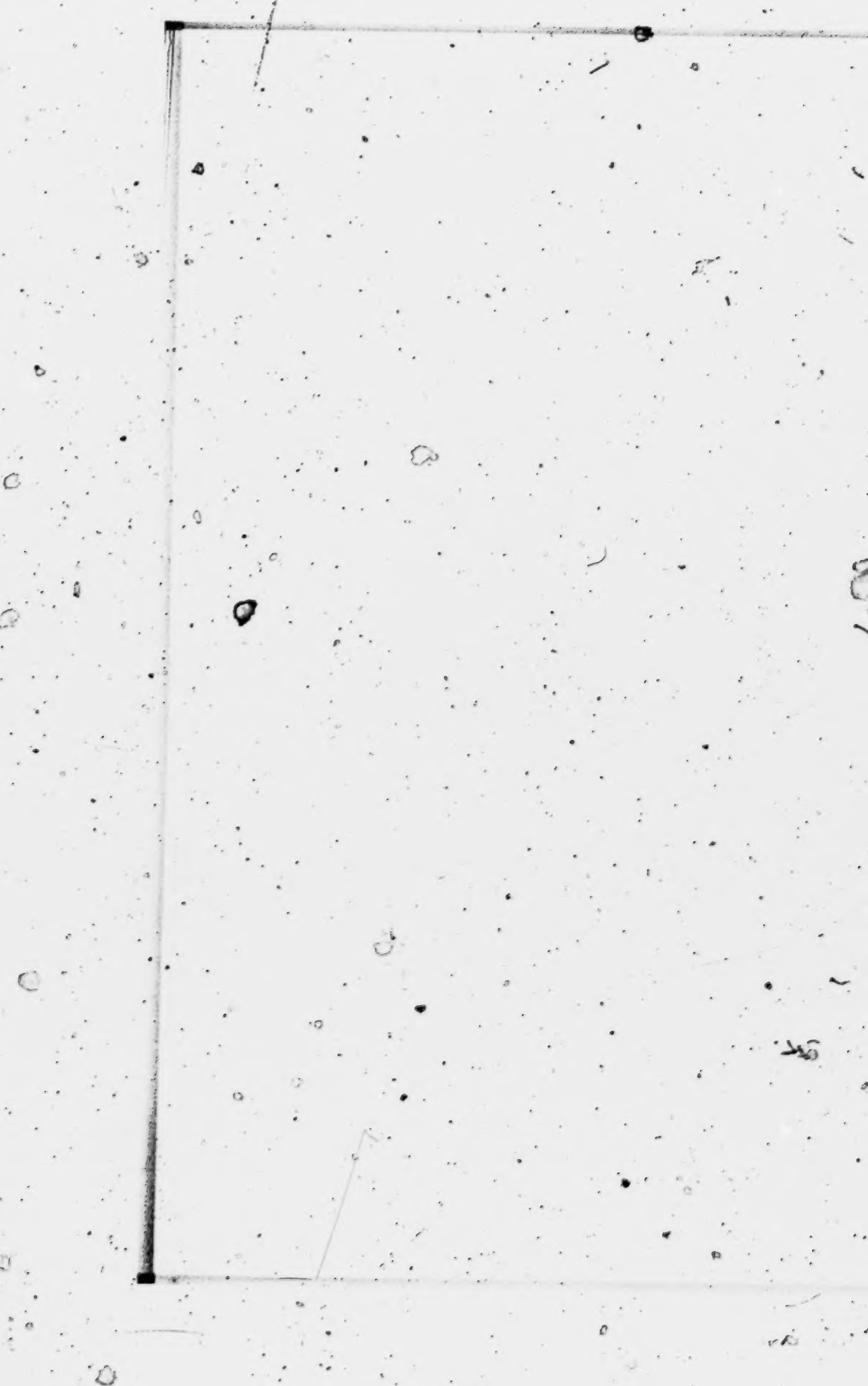
The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C. §§ 1253 and 2101 (a).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the jurisdiction on direct appeal in this case. Duddleston, et al. v. Grills, et al., 385

U.S. 455, and Alton v. Tawes, et al., 384 U.S. 315.

While counsel anticipate that it will not be an issue in this Court, the validity of P. L. 90-196 (81 Stat. 581), approved December 14, 1967, was questioned below but was not passed upon by the District Court. That statute, so far as here pertinent, reads:

> "In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled 'An Act to provide for apportionment of Representatives' (46 Stat. 26), as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that



a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress)."

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion by creating Congressional Districts in which population variances between districts are greater than necessary, as illustrated by the districts proposed by the dissenting Judge and by plans submitted by the parties.

2. Whether the District Court abused its discretion by creating Congressional Districts in which achievement of the goal of population equality was subordinated to the achievement of other self-imposed goals such as compactness, preservation of the integrity of

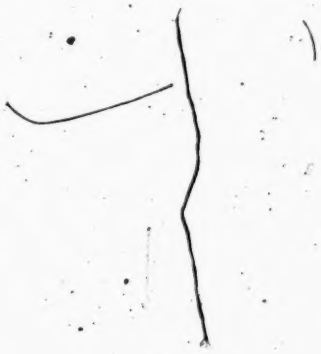
county and township boundaries, and preservation of United States Census Bureau Metropolitan Statistical Areas.

3. Whether the District Court exceeded its judicial power and usurped legislative power by drawing new Congressional Districts instead of merely making such shifts of population areas from over-populated districts to under-populated districts as were necessary to make the Congressional Districts established by the State Legislature as nearly equal in population as is practicable.

4. Whether the District Court exceeded its judicial power and usurped legislative power by presuming to establish requirements or standards, other than population equality, for Congressional Districts.

STATEMENT OF THE CASE

Following this Court's remand (385 U.S. 455) of the case (on the [first] appeal of the holding in 255 F. Supp 155 that the 1955 Congressional districting Act [Ind. Acts 1965, ch. 205] was constitutional) the District Court, on February 7, 1967, held the 1965 Act "unconstitutional and void by reason of excessive population variances," (emphasis added) enjoined further elections under it or any prior law, and retained jurisdiction "for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the General Assembly of the State of Indiana, if any, and for such other action in the premises as may be necessary." (Appendix A.)

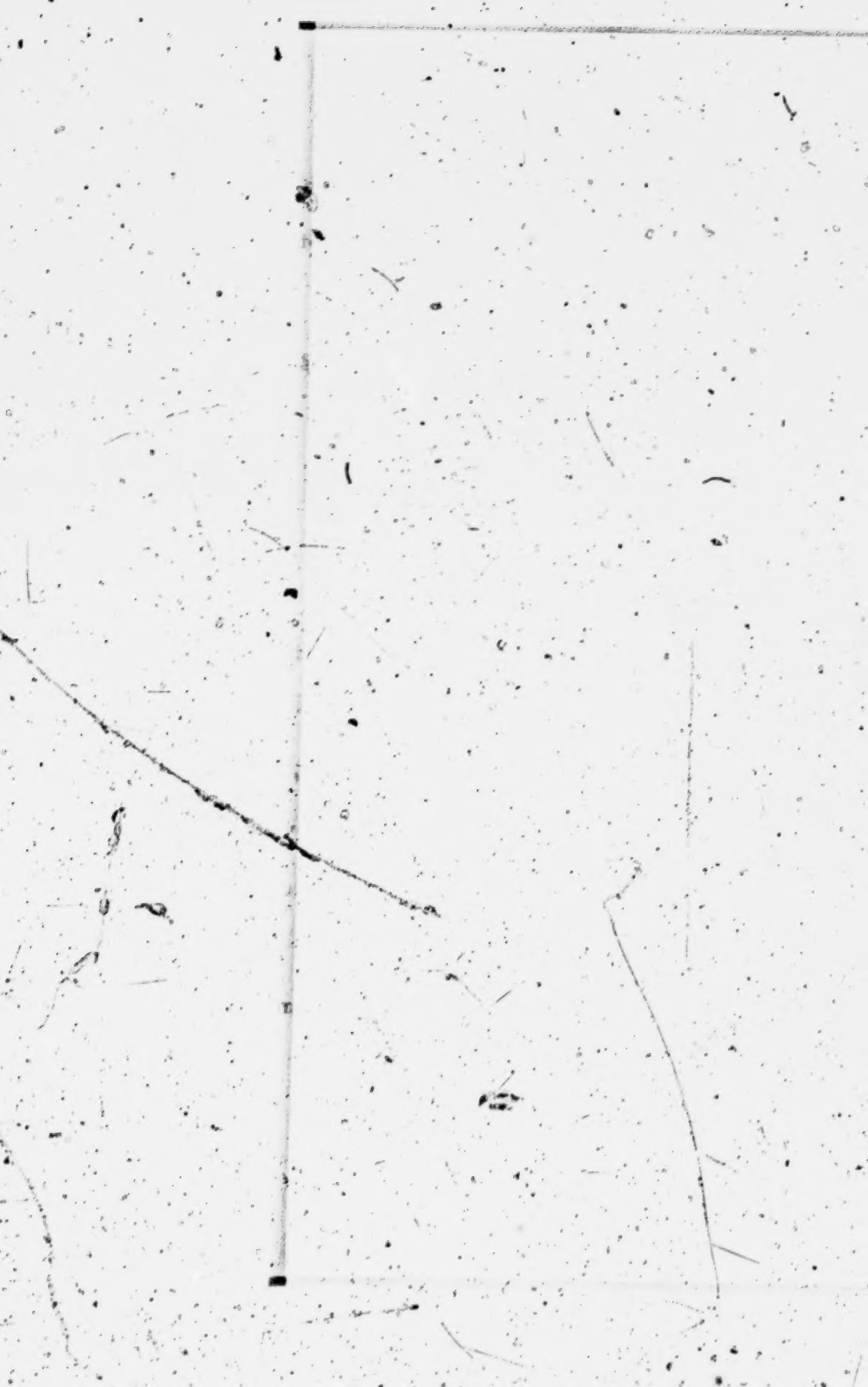


No further Congressional apportionment or Congressional districting act was ever enacted by the Indiana General Assembly, although it was in regular session at that time and for twenty-seven days thereafter. (One plan, Senate Bill 399, passed by the Democratic dominated Senate was amended into a new plan by the Republican dominated House of Representatives [as S.B. 399A]. A third plan passed only the Senate as an amendment of House Bill 1377.) Many meetings of legislative leaders, committees, and sub-committees, since adjournment, have wholly failed to reach any bi-partisan agreement on Congressional redistricting. As a consequence, the Governor has never called, and has no present intention of calling, a special session of the Indiana General Assembly.

As the result of various petitions filed by the appellees who were the first four intervening plaintiffs and the appellants in the first appeal (Duddleston, Gallagher, Marshall, and Mundy) an "evidentiary hearing" was held February 9, 1968, and on February 14, 1968, the majority opinion of Judges Knoch and Holder, drawing entirely new districts, was issued. This opinion, appended hereto as Appendix B, contains the judgment from which this appeal is taken. At the same time Judge Dillin's dissenting opinion was issued. On February 26, 1968, Judge Dillin issued a corrected dissenting opinion appended hereto as Appendix C.

Despite the fact that there was an "evidentiary hearing" on February 9, 1968, at which some testimony was received, all of the

Holder followed township boundary lines in carving the first district out of Lake County and the eleventh district out of Marion County. Both those plans constituted the other nine districts by combining whole counties, except for adding the remaining townships of Lake County to the second district and the remaining townships of Marion County to the sixth and tenth districts (1965 Act) or to the sixth district only (Court plan). There is, however, very little similarity between those two plans, as is apparent by a glance at the maps of each (Appendix B, p. 32, Appendix C, p. 33.) Judge Dillin's plan, however, (in line with the contention made in the jurisdictional statement of the then appellants, now appellees, Duddleston, Gallagher, Marshall and Mundy, on the first appeal, that adherence to county and township lines does not excuse



population variances avoidable by dividing districts on other lines; uses streets, railroads, and streams, as well as county, township and city boundaries to divide districts and achieve districts much more nearly equal than those ordered by Judges Knoch and Holder, while at the same time moving as few people as possible from the districts in which they voted in 1966, under the 1965 Act, for or against their present Congressman. (Appendix C, p. 33.)

The chart on the following page compares the 1965 Act, the Court-ordered plan, and Judge Dillin's plan as to population variances, and compares the majority plan with that of Judge Dillin also as to the number of persons added to, and the number of persons taken from, the same numbered 1965 district to constitute the ordered or proposed district.

Dist. No.	POPULATION VARIANCE (+indicates overpopulation) (-indicates underpopulation) 1965 Act	Court Plan	Dissent	PERSONS MOVED Court Plan Added to	Court Plan Taken from	Dissent Added to	Dissent Taken from
1	+30,345	+3,404	+ 48	12,282	39,223	0	30,297
2	+ 7,201	- 636	- 93	152,245	160,082	30,297	37,591
3	-39,784	-5,643	- 68	147,163	113,022	39,716	0
4	+27,074	- 39	+118	79,677	106,790	0	26,956
5	+ 2,247	-4,098	- 49	221,723	228,068	0	2,296
6	+15,098	+4,334	- 19	180,873	191,637	0	15,117
7	-54,200	+2,757	+104	83,593	26,636	54,304	0
8	+19,389	+ 897	+112	43,513	62,005	0	19,277
9	+ 1,070	+1,497	- 1	51,397	50,970	0	1,071
10	-17,645	-6,705	- 83	148,391	137,451	17,562	0
11	+ 9,210	+4,237	- 64	94,749	99,722	0	9,274
Max. +(1)	30,345	(6) 4,334	(4) 118	1,214,806	1,215,606	141,903	141,903
Max. -(7)	54,200	(10) 6,705	(2) 117		- T O T A L S -		

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The majority judges of the three-judge District Court constructed what, by comparison with the Congressional District Act of the Indiana General Assembly (ch. 205, Ind. Acts of 1965) are almost entirely new districts. Although the 1965 districts had been declared unconstitutional by reason of excessive population variances (and for that one reason only) they did, nevertheless, in the one election in which they were used prior to being voided, prove to be fair, as between the two major political parties, in that proportional representation was achieved. In that 1966 election the total Republican-Democratic vote was 1,676,664. Of this total the eleven Republican Congressional candidates received 897,086

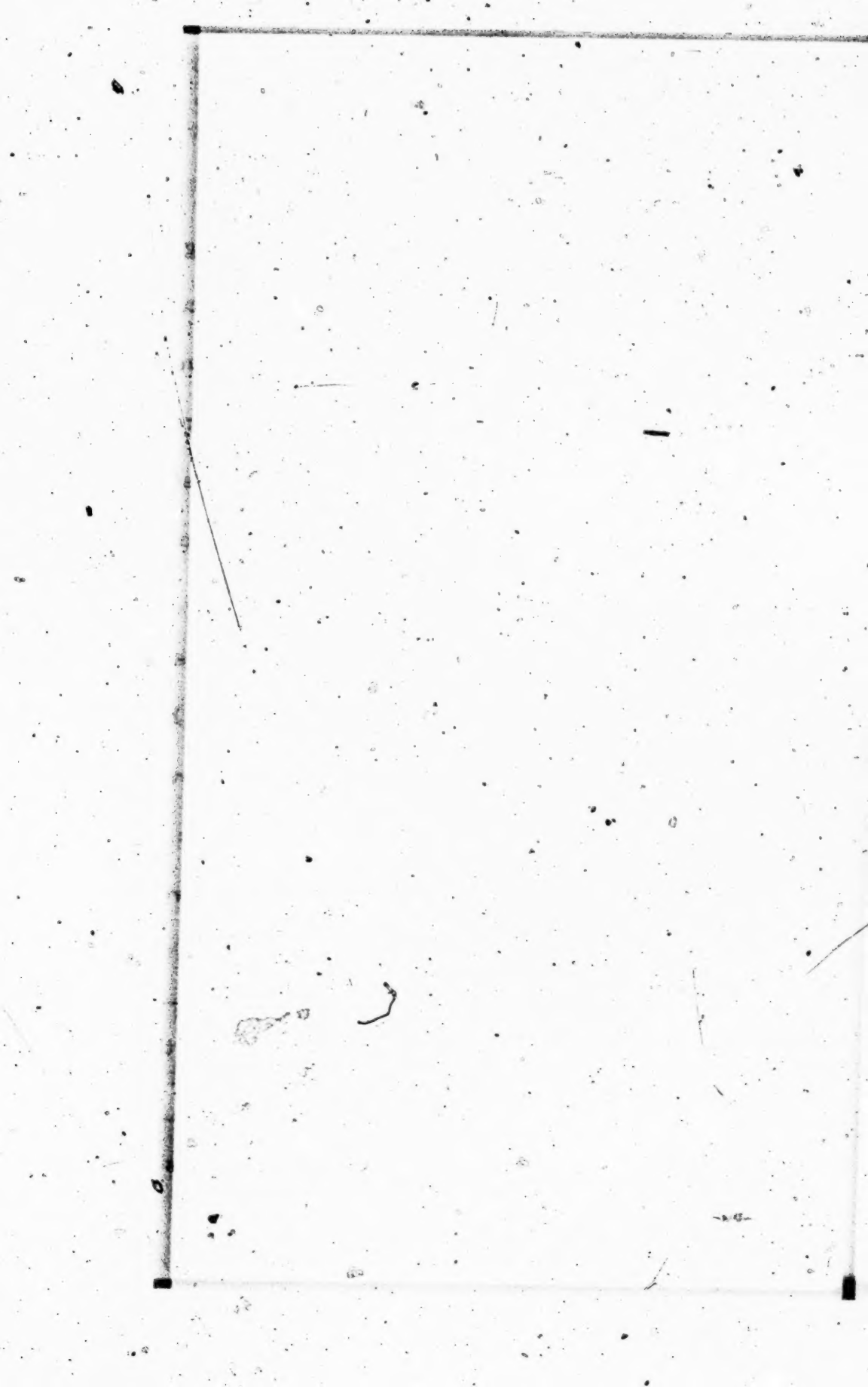
votes, which is 53.5% of that total. The Republicans elected six Congressmen which is 54.5% of the State's eleven Congressmen. The five Congressmen elected by the Democrats, being 45.5% of Indiana's delegation, is proportional to the eleven Democratic candidates' 46.5% (779,578 votes) of the total for Congressmen. (The 1966 vote for Indiana Secretary of State was 890,572 Republican and 773,375 Democratic or 53.5% Republican and 46.5% Democratic which further confirms the fairness or proportionality of the six-to-five Republican majority in Indiana's present Congressional delegation. By contrast, if the majority-ordered districts had been in effect during the 1966 elections the Republican 53.5% of the vote would have elected 63.6% (i.e., seven) of Indiana's Congressmen.[1]

1. Analysis by reporter Gerry LaFollette, published February 17, 1968, in the Indianapolis

Because the politically stalemated 1967-68 Indiana General Assembly has been unable to pass a new Congressional Districting Act to replace the 1965 Act declared unconstitutional for excessive population variances between districts, it has become necessary for the three-judge District Court, which has retained jurisdiction, to make some further orders for the conduct of the 1968 election. The District Court has made such further orders by drawing these new districts. In so doing the District Court has chosen to legislate rather than merely to provide a judicial remedy. And the legislation it has enacted is itself unconstitutional for excessive population variances between districts.[2]

1(contd.)
News, Indianapolis, Indiana. Some claim the majority plan is 9-2 Republican, he states.

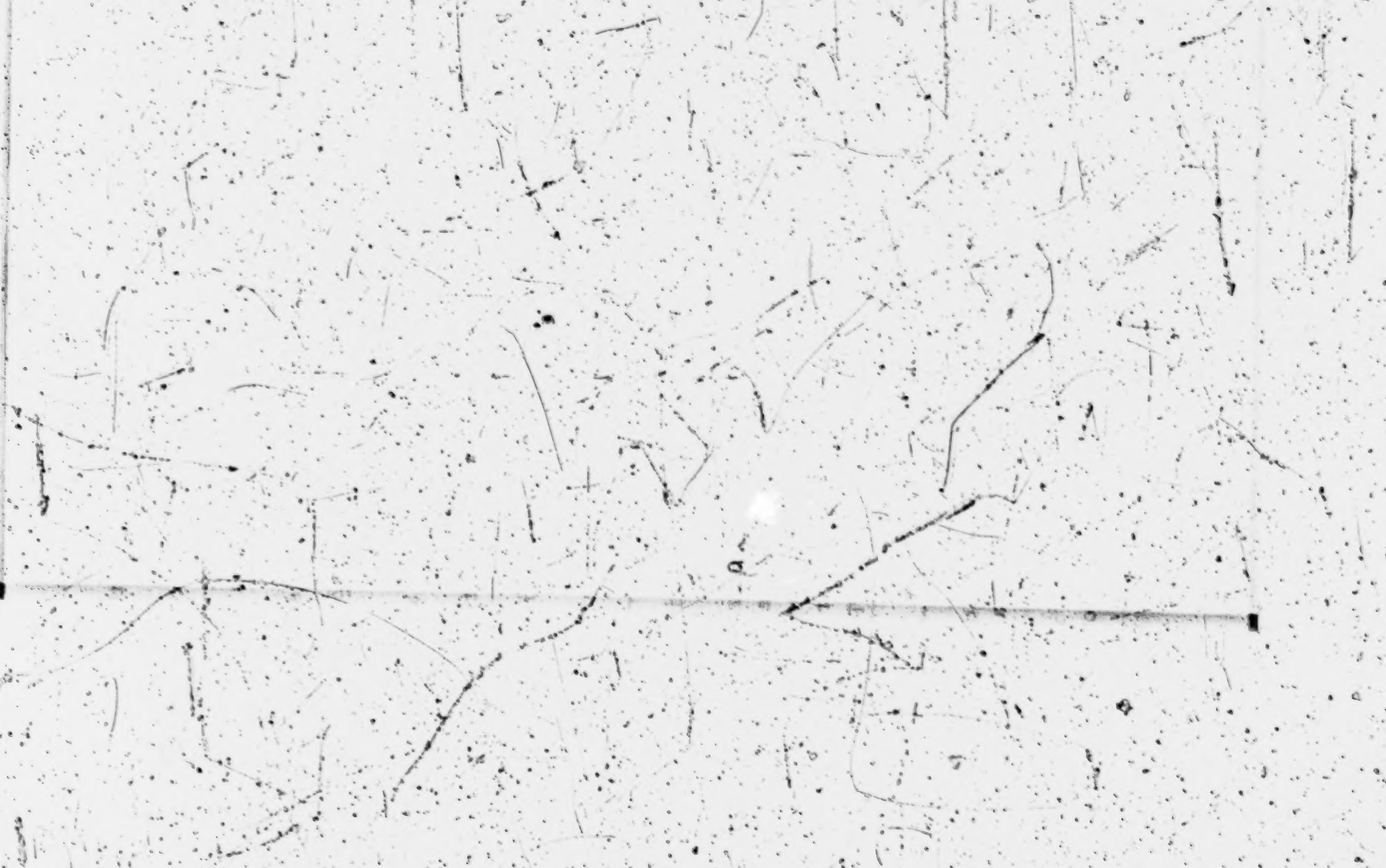
2. Not nearly so excessive as the 1965 Act, but more excessive than necessary. Witness the



This Court has never yet defined the extent of the District Court's power when faced with the necessity to provide a remedy when a State's legislature has failed to draw new districts following voiding of its old districts.[3] Nor if that power be unlimited, what limits a court's discretion in its exercise. The District Courts are wholly without direction from this Court as to the limits of their power to fashion

2. (contd.)
judicial remedy proposed by the dissenting judge whose minimal adjustments of the 1965 districts reduces the maximum variance to a de minimus of 118 persons overpopulation (Dist. 4) and 93 persons underpopulation (Dist. 2) as against the majority's maximum of 4,334 persons overpopulation (Dist. 6) and 6,705 persons under-population (Dist. 10).

3. All that can be logically inferred by reading Alton v. Tawes, et al., 384 U.S. 315, and Maryland Citizens Comm., etc., et al. v. Tawes, et al., 253 F.Supp. 731, which it affirms, is that three-judge Dustruct Court redistricting judgments are appealable directly to the Supreme Court. The



remedies (or of their discretion in its exercise) and the public is without standards by which to measure the validity of the remedies fashioned. The great public interest in and concern over the entry of the courts into this new phase of this new type of litigation is apparent.

In Colgrove v. Green, 328 U.S. 549, 556, Mr. Justice Frankfurter warned against courts entering the "political thicket". But the widespread, gross inequalities between the weight of one person's vote in different parts of the same State, in both Congressional elections and the election of State legislators, has made judicial intervention a necessity. Appellants have no quarrel with the philosophy of Baker v. Carr, 369 U.S. 186; Wesberry v. Sanders,

3. (contd.)
questions raised by the appeal, if any, are not published.

376 U.S. 1; and Reynolds v. Sims, 377 U.S. 533. Appellants would not suggest that the United judiciary recede to the cloistered safety of Colgrove v. Green, but do suggest that its "political thicket" caveat (repeated by Mr. Justice Frankfurter in his dissent in Baker v. Carr, 369 U.S. at 266) should not - and in fact cannot - be forgotten. When a Court is forced to provide a remedy because the legislature has failed to apportion legislators or to district Congressmen, the Court should go no farther into the thicket than necessary to remedy the constitutionally condemned evil. If the Court assumes to correct more than the Constitution condemns, and to substitute its political judgment of what ought to be the law for the Legislature's judgment, the Court presumes to act as a legislature, rather that as a court, and can expect the same

political criticism commonly heaped on legislatures for their political decisions. The court which does so has "enter[ed] upon policy determinations for which judicially manageable stands are lacking."[4/]

A reading of the few reported District Court cases[5/] in which Congressional Districts have been drawn indicates that those court have been quite circumspect in avoiding any usurpation of legislative power and have thereby,

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4. Baker v. Carr, 369 U.S. 186, 226.

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5. Roberts v. Babcock, 246 F.Supp. 396 (D. Mont. 1965).
Maryland Cit. Comm., etc. v. Tawes, 253 F.Supp. 731 (D. Md. 1966) affirmed sub nom. Alton v. Tawes, 384 U.S. 315.
People v. Kerner, 33 Ill. 2d 460, 211 N.E. 2d 736 (1965) U.S. Dist. Ct. participated.
Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz.) (1966)
Baker v. Ellington, 273 F.Supp. 174 (M.D. Tenn., 1967).

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presumably, held political criticism to a minimum.[6] A few have even refused to draw districts on the ground that no legislative authority had made Congressional districts a requirement in the State involved.[7]

While disagreeing with the District Court majority's usurpation of legislative power

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6. None of the opinions in these cases expressly professes to have found (or to have followed) guidelines in the comments on remedial devices in section X of this Court's opinion in Reynolds v. Sims, 377 U.S. 533, 585, but all were undoubtedly aware of Mr. Justice Stewart's statement in his concurring opinion (377 U.S. at 588) that: "I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as closely as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment."

7. Park v. Faubus, 238 F.Supp. 62 (E.D.Ark. 1965).
Calkins v. Hare, 228 F.Supp. 824 (E.D. Mich. 1964).

and deep penetration of the political thicket, appellants do, however, agree with that part of the majority opinion and judgment which holds that section 1 of the 1965 Congressional Districting Act is still in full force and effect and requires the election of Congressmen to be from districts. The logic or reasoning on which that holding is based is not stated in the opinion. Obviously, however, since the earlier declaration of unconstitutionality of the 1965 Act was based solely on excessive population variances between districts, and section 1 defines no districts, there is no reason for holding it unconstitutional. If that be the Court's reasoning, then it must follow that districts (if any) in which the population variance from ideal is not excessive are not unconstitutional. (And, further, the unconstitutional districts are unconstitutional only to the extent of their

variance from as nearly ideal as is practicable.) And, indeed, the majority opinion states (on page 20 of Appendix B): "Chapter 205 of the 1965 Act[s] of the Indiana General Assembly created only two (2) of the eleven (11) districts within tolerable limits of population."

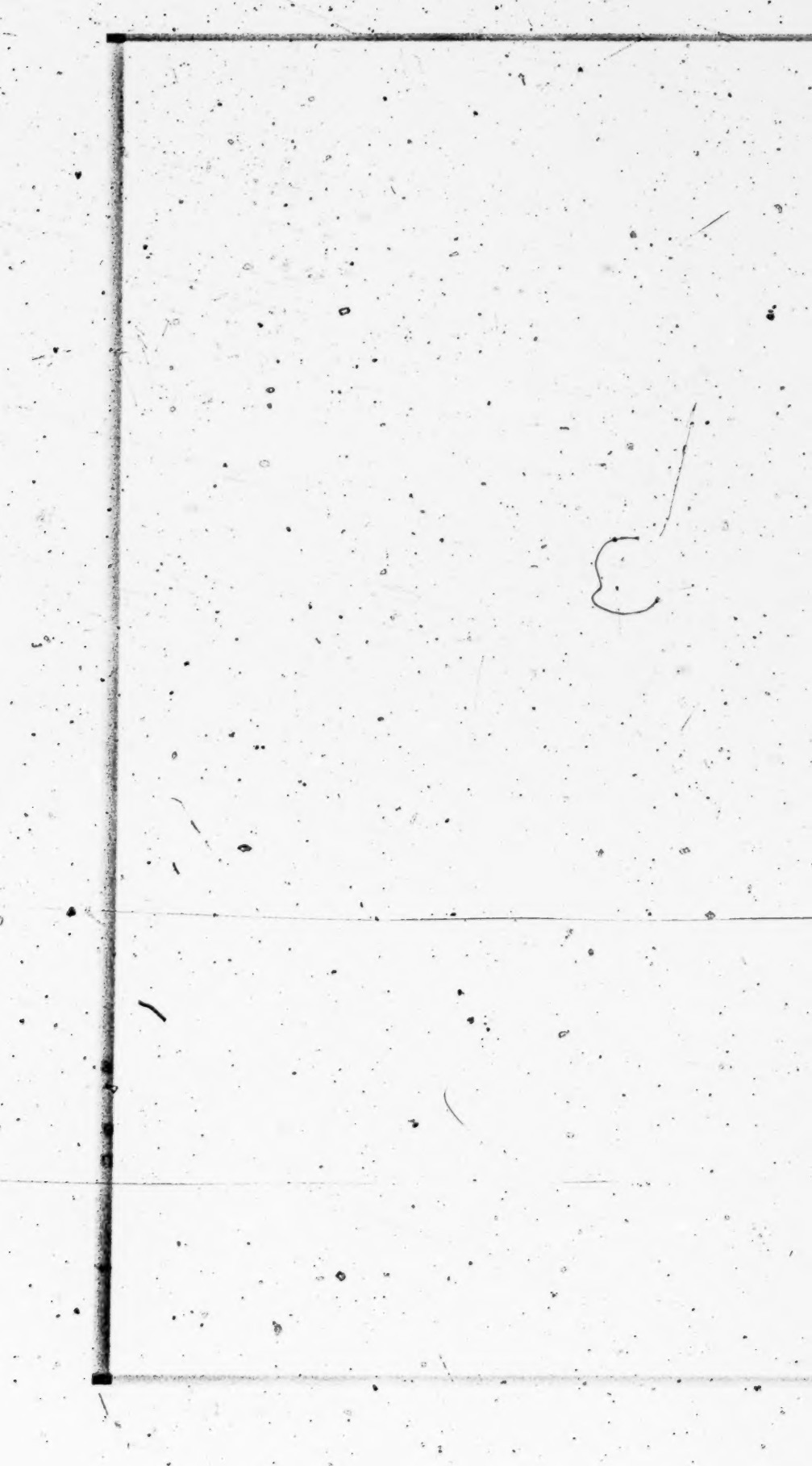
Those two districts would be the fifth and the ninth, inasmuch as they have the two lowest variances.[8/] By the majority's population standards these two districts are constitutional and if, as the decisions of this Court indicate to appellants, attainment of the one-person-one-vote ideal (as nearly as is practicable) is the only constitutional

8. The fifth is over-populated by 2,247 persons, or 0.5% of an ideal district, while the ninth is over-populated by 1,070 persons or 0.3%. These variances are much less than the maximum variances of the Court plan.

requirement, these two districts are constitutional and should have been left as they were. The majority of the Court, however, far from leaving them as they were, made extensive changes in both.

The only reason given for adding Floyd County's 51,397 population to the already slightly over-populated ninth district is found on page 20 of the majority opinion in Appendix B, in the statement that: "The 1965 Act divided the homogeneous counties of Floyd and Clark and placed them in two separate districts. . . ."[9] and despite all the homage

9. The same paragraph discloses the majority considered them homogeneous because they are one of nine Metropolitan Statistical Areas created in Indiana by the United States Census Bureau. It can be demonstrated that no change in the ninth district was made necessary by reason of necessary population adjustments in other districts, even under the majority's self-imposed policies.



paid to "traditional districts," no explanation is given why Clark County was not returned to the eighth district, where both it and Floyd were by the 1941 Act[10] and where also is, and was, the Vanderburgh County Metropolitan Statistical Area, the ninth district being otherwise without any part of a Census Bureau designated metropolitan area.

If a Republican dominated Legislature had made such unnecessary shifts of counties to and from the ninth district no self-serving declaration of eschewal of unnecessary violence to the heart of traditional districts, county lines and township lines and adherence to the homogeneous influence of metropolitan centers of population as the heart of any plan of

10. Prior to 1941 Indiana had twelve districts.

districting, would save it from the charge that Floyd County was shifted to the already Democratic ninth district to avoid the possibility that its traditional Democratic majority would swing the eighth to the Democratic candidate in a close or Democratic year. Yet such unnecessary changes would be the legislative prerogative of the General Assembly, so long as population equality was also achieved, as nearly as is practicable. The District Court's majority, in usurping the legislative prerogative of exercising political judgments unnecessary to a judicial remedy for the unconstitutionality of the 1965 Act, has invited (even if inadvertently) public criticism that its decision had a partisan motivation.

No specific reason is given for the many changes in the nearly perfect fifth

district,[11] including the shift of the incumbent Democrat's home county of Huntington to the highly Republican fourth district. While Huntington County's addition to the fourth district gives the fourth an eye-catching rectangular appearance and, with other changes, results in the fourth being the most nearly perfect population-wise of the majority plan's eleven districts, its removal from the fifth, along with the other changes, increased the fifth's 1965 over-population of only 2,247 (0.5%) to 4,098 (0.96%). Judge Holder's prior criticism of the 1965 Act[12]

11. Five of its nine counties were shifted from it and eight new counties were added.

12. In his dissent in Grills, et al. v. Branigin, et al., 255 F. Supp. 155, at 160, Judge Holder cites as an example of "gerrymandering" in the 1965 Act, this example: "One sees that two minority Congressmen are placed in completely new districts with only their home county retained from the old district in which the people had repetitively chosen them as their congressmen."

for putting two incumbent Congressmen in the tenth district would seem to be even more valid as a criticism of the majority plan, the difference being the Legislature's prerogative to make such political judgments. The majority, however, sees no evil in the similar result they have achieved in that it is declared to have been the unplanned result of adhering to standards of compactness, etc. The full statement of the majority, as found at page 27 of Appendix B, is particularly interesting in its oblique denial that the majority had entered the political thicket because, among other things, they chose "to adhere to the traditional heart of the districting plan of Indiana insofar as is reasonable" in preference to the 1965 pattern:[13]/

13. Overlooked is the fact that the majority changed the 1941 Act's fifth district (the "traditional district") more than did the 1965 Act, in that the majority added five

"We cannot agree with our colleague in dissent in his attempted adherence to the 1965 pattern of districts. The majority chooses to adhere to the traditional heart of the districting pattern of Indiana insofar as it is reasonable and effect practical homogeneous compactness and as related to the Metropolitan Statistical Areas of the 1960 Census. Any other consideration includes the forbidden factor of entering the political thicket of which Justice Frankfurter warned in the case of Colegrove v. Green, 66 S. Ct. 1198, 328 U.S. 549, 90 L. Ed. 1432 (1946). Unlike the unconstitutional apportionment of the 1965

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13. (contd.)
counties (totaling 142,497 people) and subtracted three (totaling 182,205) while the 1965 Act added three fewer counties (totaling 96,634 less people moved) but subtracted the same number of counties, which, however, moved 102,979 less people. The majority may have achieved a slightly more compact fifth district but not a more traditional one and not a more nearly perfect district population-wise. Instead, the fifth's overpopulation has been almost doubled, increasing its percentage of variance from one-half of one percent to almost one percent. And with the additional "unplanned" result of

> Act of the Indiana General Assembly, the majority's apportionment does not pit an incumbent congressman against another of the same political party and does not indulge in grotesque geographical alignment of counties to accomplish such a result. The unplanned results of the majority's districts which adhere to Indiana's historical patterns, tolerable population variances and compactness of a judicial apportionment has resulted in the avoidance of such interference in that no incumbent congressman is pitted against another of the same political party and in one (1) instance is an incumbent congressman of one (1) party pitted against another of the opposite party. The majority believes Indiana will be best served with the compactness of the districts created."

That one bit of the debate between the District Court's judges concerning the proper judicial approach to providing a remedy in cases of this kind (of which there are certain to be

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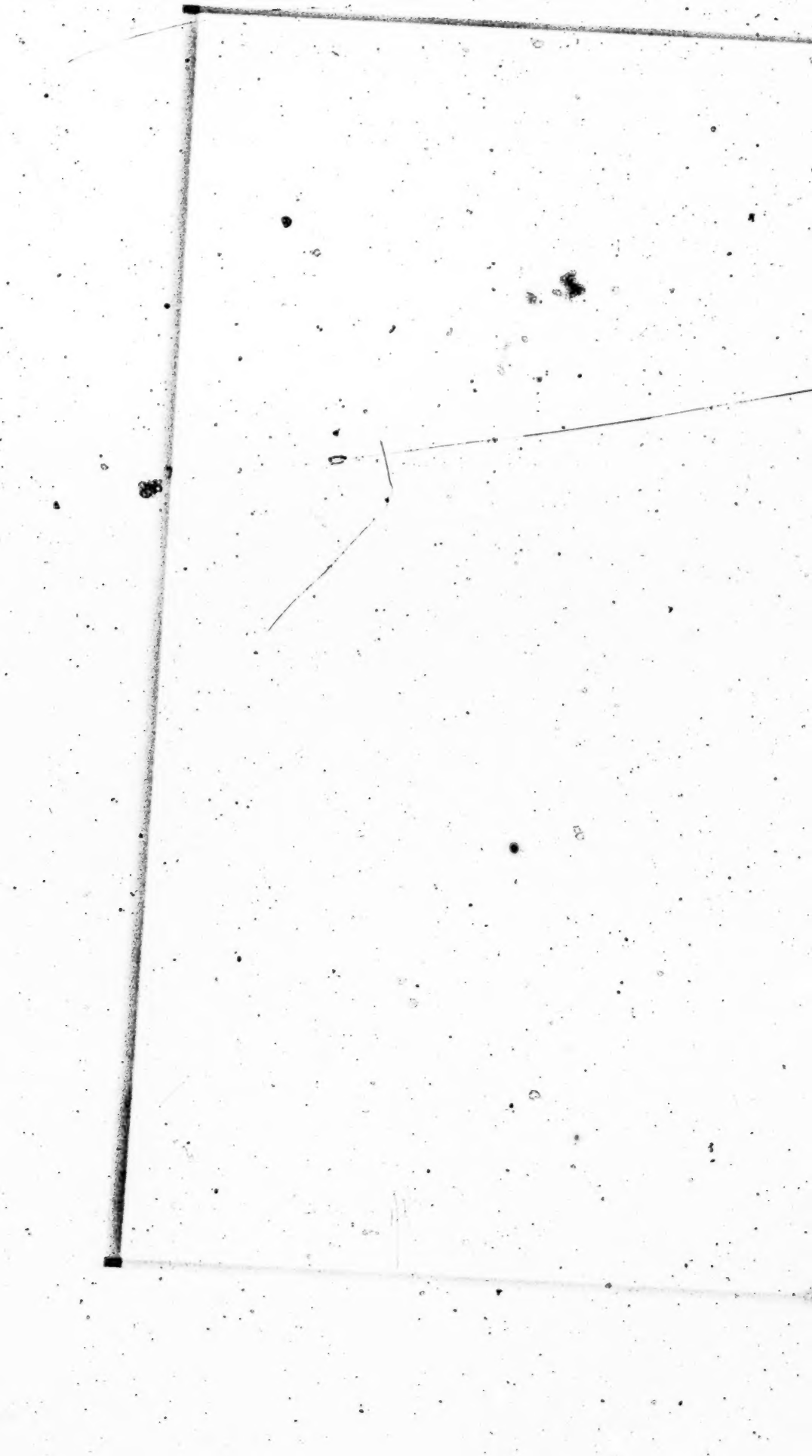
13. (contd.)
removing the incumbent's home county which had been there for over a quarter-century, at least.

many more in the near future) would seem to counsel to make it clear beyond doubt that this appeal presents a substantial question which urgently requires an answer by this Court. If the minds of counsel read more into that quotation than would the more detached mind, certainly the whole of the two opinions read together make the point. Whether the majority judges are right, whether the dissenting judge is right, or whether both are wrong, the District Courts are in great need of the Supreme Court's views and the people of Indiana are in need of a judicial remedy in which they can have the confidence and respect ordinarily accorded to judicial decisions, free of the doubts and frustrations with which they often react to partisan legislative enactments, even when passed by representatives they have elected.

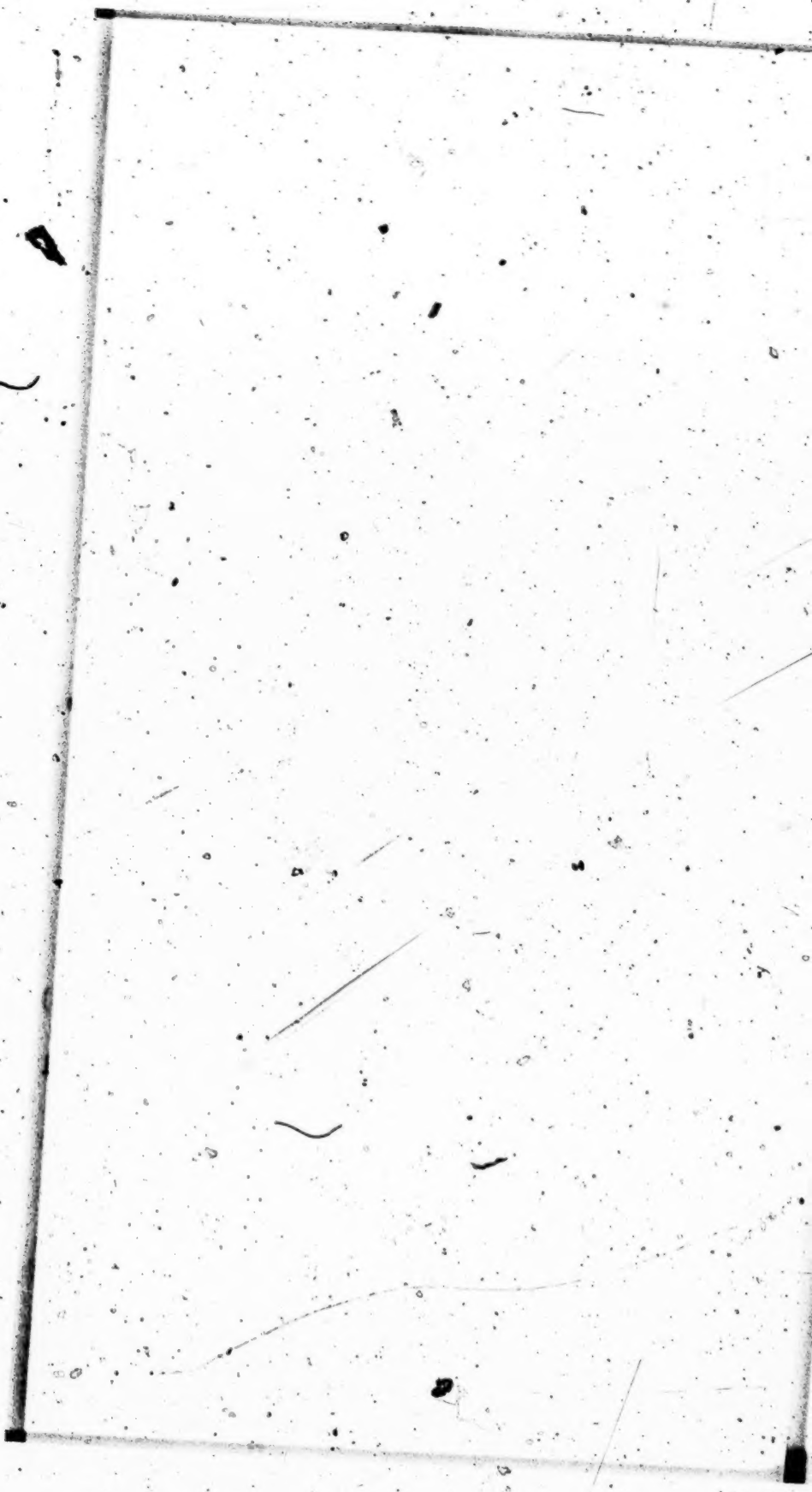


The question of how nearly equal in population judicially imposed Congressional districts must be may seem, on first blush, to be without great substance when the majority plan's population variance between its largest and smallest districts is only 2.6% of an ideal district (and the dissenting Judge's plan is 0.05%). However, the basic disagreements between the majority and their dissenting colleague which lead to this percentage differential are much greater than the differential itself.

If the same plan the majority has ordered had been enacted by the Indiana General Assembly, and the same plan the dissenting Judge has posed had been introduced and rejected by that legislature, appellants (as the defendant members of the State Election Board

face of a demonstrated possible plan with lower variances. And more concretely, whether the District Court, to justify the higher variances in its plan, can impose on itself standards of compactness, integrity of county and township boundaries, and non-division of United States Census Metropolitan Statistical Areas;[14] standards which neither the Constitution, nor any act of Congress, nor any act of the Indiana General Assembly has imposed. In other words, are District Courts which draw Congressional districts subject to the same rules as to

14. The majority's proclaimed, but undemonstrated adherence "to the traditional heart of the districting plan of Indiana insofar as . . . is reasonable" (Appendix B, p. 27) appears to be offered not as a justification for population variances, but as a political judgment that these traditional hearts of districts are preferable to the hearts of the 1965 districts because the latter are not sacrosanct nor steeped in tradition. (Appendix B, p. 27.)



population equality as are State Legislatures and, if so, has the majority of the District Court followed those rules or has it violated them?

Next to the question of whether the District Court can legislate an entirely new plan or may only correct the unconstitutional population variances in the State Legislature's plan, the most basic disagreement between the majority Judges and the dissenting Judge is over the size of the building blocks the District Court may, or should, use in building new, or correcting old, districts. And about that question, the parties who are now appellees, had this to say in their jurisdictional statement when they were appellants:

> "The United States Census of 1960 shows the population of Indiana by counties, or by cities, towns, townships, and even plat areas within major urbanized areas.

"Thus it was practical to use county, township, town or city boundary lines and rivers or other geographical or natural boundaries in defining the Congressional Districts to the end that each of the districts would have been substantially equal in population. This was not done.

"The Evidence showed that town, city, township and ward boundary lines had been used in the past by the Indiana General Assembly in defining Congressional Districts.

"In Indiana Acts 1931, Chapter 113, Section 14, Page 449, the Twelfth Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as Township lines.

"In Indiana Acts 1935, Chapter 1, Page 1256, the Eleventh Congressional District was defined by use of Ward boundary lines within the City of Indianapolis, as well as White River, incorporated towns of Woodruff Place and Beech Grove, Township and County boundary lines.

"In Indiana Acts 1965, Chapter 205, the Act before this

Court, the legislature used township boundary lines to define the 1st, 2nd, 6th, 10th and 11th Congressional Districts, thus recognizing the fact that it is entirely proper to use township lines as boundaries of Congressional Districts rather than county lines.

"The evidence showed that by using Township and Municipal lines as boundaries, the variances from the ideal District can be reduced to an average variance of approximately 1%, in lieu of the present 12.8% in one District as established by the 1965 Indiana General Assembly. This was pointed out by the minority opinion of the Court:

" 'The unquestioned facts before this Court are that Indiana and its legislature could and should have reapportioned Indiana by one of countless combinations by realigning of Counties in groupings and/or townships in groupings. Any one of such combinations would have been constitutional and in accord with the teachings of the Supreme Court.' (Emphasis added.)

"The failure of the 1965 General Assembly of the State of Indiana to

use available practicable means and methods in reapportioning the Congressional Districts is the basic issue presented by this appeal. The undisputed evidence was that the 1965 General Assembly could have followed one of many practicable methods of districting the State and dividing the population among the districts, any one of which would have resulted in substantially more equal voting power of the voters within the districts than the approximate 20% variation between one District (the 7th District) and another (the 1st District) established by the 1965 Indiana Act.

* * *

"As was observed in Reynolds v. Sims (1964), 377 U.S. 533, at Page 578, (supra), Congressional districts must fit into tighter limits of tolerance than do State reapportionment plans:

> " 'Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in Congressional districting. . . .'

"In preserving the weight equality of each citizen's vote the

State of Indiana could and should have used available Township, City, and Town boundaries. As was observed in Reynolds v. Sims (supra), 377 U.S. 533, at page 575,

> " 'Political subdivisions of States--Counties, Cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of State governmental functions.' "

While it may or may not be claiming too much to contend that the foregoing quotation has become the law of this case, its logic is persuasive to say the least. But, more to the point, if it is not the law of the case, it reveals a need for direction to District Courts, State Legislatures, and to their advisers on how small the building blocks must be with which the boundaries between Congressional districts

are drawn, when the use of blocks smaller than those used would have reduced a variance of 2.6% of ideal between the largest and smallest district to .005% of an ideal district.

Appellants, in stressing the need for guidance and directions, are not asking this Court to note jurisdiction for the purpose of rendering an advisory opinion. The questions posed by this appeal are very real and very vital questions on the answers to which affirmance or reversal of the District Court's judgment turns. And that judgment is the very antithesis of an advisory opinion. Rather, the need for directions and guidelines is stressed as an argument that the questions presented are substantial because the answers will affect more than the outcome of this case and may affect the voting rights of citizens in many States in the course

of the next few years. 15/

CONCLUSION

This Supreme Court has and should exercise jurisdiction in this case to reverse a judgment of a District Court which goes beyond providing a necessary judicial remedy and legislates public policy and decides political questions for the State of Indiana and imposes on the State of Indiana eleven Congressional districts which are not as nearly equal in-

15. While appellants believe this appeal can be decided in time for this Court's decision to govern the 1968 election of Congressmen in Indiana, a later decision will not, however, be moot. There is no assurance that the General Assembly to be elected in 1968 (approximately one-half of the Senate will be hold-overs) will be able to agree on a constitutional redistricting Act. Therefore, the majority plan, if not voided by this Court, may govern not only the 1968 election, but also the 1970 election.

population as is practicable. Furthermore, the Court should exercise its jurisdiction to reverse a judgment of a district court which imposes on the State of Indiana court-drawn districts which are not as nearly equal in population as is practicable.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NELSON G. GRILLS, Plaintiff,	)	
DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY, Intervening Plaintiffs,	)	
-v-	)	NO. IP 64-C 101
ROGER D. BRANIGIN, EDWIN M. S. STEERS, THURMAN M. DeMOSS, As Members of the State Election Board of Indiana, Defendants.	)	

OPINION ON REMAND

The previous history of the above entitled action in this Court is set out in the opinion of the Court filed February 17, 1966, reported as Grills v. Branigin, 255 F. Supp. 155. Such previous opinion held, Judge Holder dissenting, that Chapter 205 of the Acts of 1965,

enacted by the General Assembly of Indiana and reapportioning Indiana's eleven congressional districts, was constitutional within the provisions of Article 1, § 2 of the Constitution of the United States.

The intervening plaintiffs, Dorothy C. Duddleston, et al, thereafter appealed such decision to the Supreme Court of the United States. On January 9, 1967, that Court announced its opinion, Duddleston et al v. Grills et al, 385 U.S. ___, 87 S.Ct. 611, vacating the judgment and remanding the case for further consideration in light of Swann v. Adams, 385 U.S. ____, 87 S.Ct. 569, decided the same day, Wesberry v. Sanders, 376 U.S. 1, 84 S. Ct. 526, 11 L.Ed.2d 481, and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506. No timely petition for rehearing was filed, and

the mandate of the Court has now been issued.

This Court, having given further consideration to the case in the light of such mandate and of the authorities cited therein, is now of the opinion and therefore finds that said Chapter 205 of the Acts of 1965 is unconstitutional and void by reason of excessive population variances between the congressional districts therein constituted.

A fortiorari the Court further finds that Chapter 174 of the Acts of 1941, enacted by the General Assembly of Indiana and being the congressional apportionment act in existence immediately prior to the enactment of said Chapter 205 of the Acts of 1965, is likewise unconstitutional and void.

The Court takes judicial notice of the fact that Thurman M. DeMoss has replaced

James E. Noland as a member of the State Election Board of Indiana, and that the said Thurman M. DeMoss, Roger D. Branigin and Edwin M. S. Steers now comprise the membership of such Board. The Court therefore, on its own motion, now substitutes the said Thurman M. DeMoss for the said James E. Noland as a party defendant herein.

The General Assembly of Indiana, now meeting in regular session, has adopted House Concurrent Resolution No. 6, and has caused a copy of the same to be forwarded to the Court in an informal manner. The resolution requests this Court to supply the General Assembly with "definitive guidelines by which said body can accurately interpret the intent of Article 1 Section 1 of the United States Constitution." We mention such resolution, despite the fact that it

is not and could not properly become a part of the record in this case, as a courtesy due the legislative branch of government of the State of Indiana. We are unable to comply with the resolution for the reason that the federal courts have consistently declined to give advisory opinions since the beginning of the Republic. Hayburn's Case, 1796, 2 Dall. 409, 1 L. Ed. 436.

The Court takes judicial notice of the fact that elections were conducted in November, 1966, in each of the eleven congressional districts established by Chapter 205 of the Acts of 1965, and that the congressmen elected at such election were duly seated and are now serving in the Congress of the United States. Nothing herein contained should be construed as casting any doubt upon the validity of their respective elections, nor upon their right to serve out the terms

for which they were elected.

In view of the findings herein made, it is considered and ordered that the defendants Roger D. Branigin, Edwin M. S. Steers and Thurman M. DeMoss, as members of the State Election Board of Indiana, and their successors in office, be and they are hereby restrained and enjoined from conducting any further elections pursuant to said Chapter 205 of the Acts of 1965, or Chapter 174 of the Acts of 1941, or any previous Act of the General Assembly of Indiana purporting to establish districts for the election of congressmen from such State.

The Court retains jurisdiction of this action for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the General Assembly

of the State of Indiana, if any, and for such other action in the premises as may be necessary.

Dated this 7th day of February, 1967.

/S Win G. Knoch
Win G. Knoch, Judge,
U. S. Circuit Court of
Appeals for the Seventh
Circuit, Designated Member
of the Three-Judge Trial
Court

/S Cale J. Holder
Cale J. Holder, Judge, U. S.
District Court, Designated
Member of the Three-Judge
Trial Court

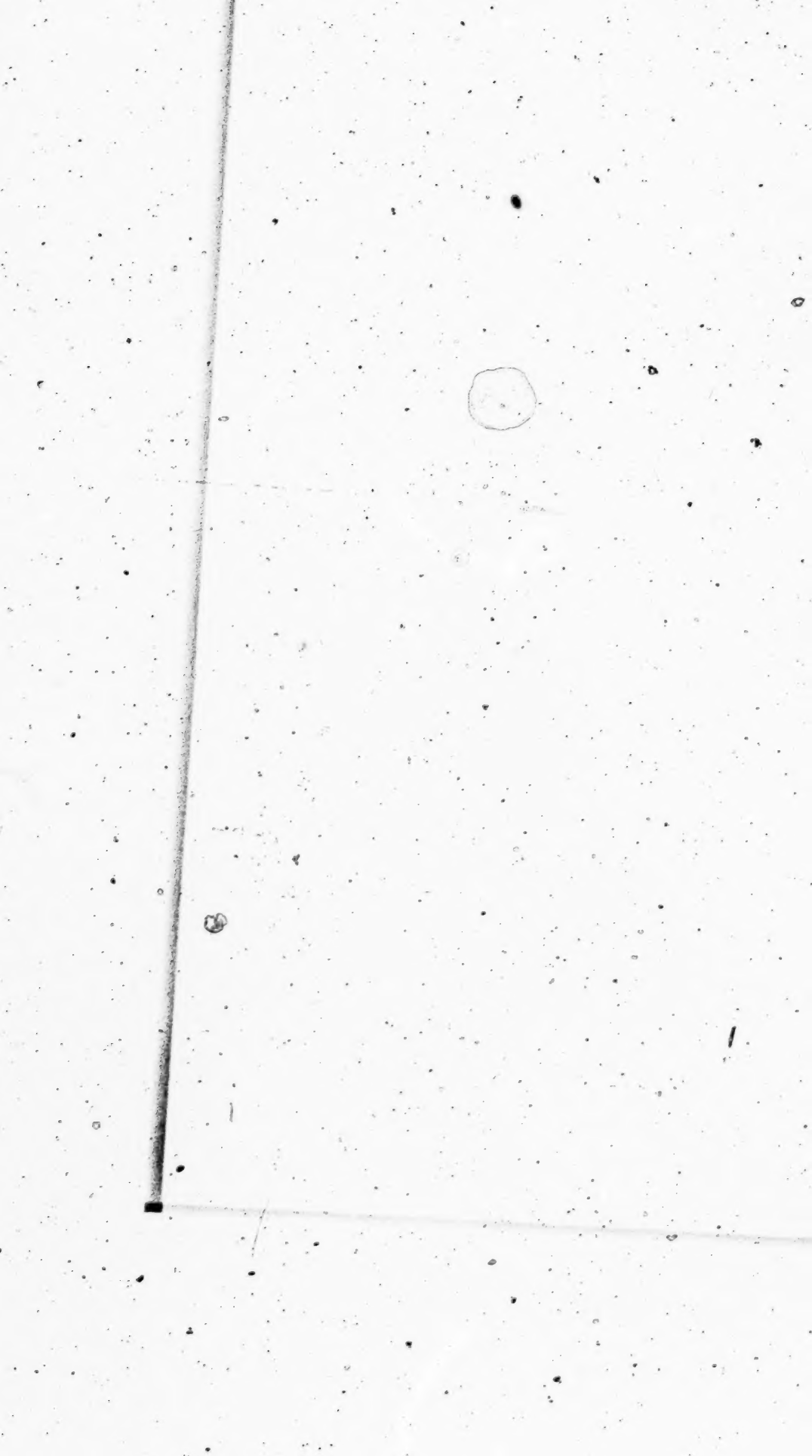
/S S. Hugh Dillin
S. Hugh Dillin, Judge, U. S.
District Court, Assigned
Trial Judge, and Member of
the Three-Judge Trial Court

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NELSON G. GRILLS, Plaintiff,	)	
DOROTHY C. DUDDLESTON,	)	
JOHN P. GALLAGHER,	)	
MILES H. MARSHALL,	)	
LOUIS Y. MUNDY,	)	
JOSEPH W. SUMMERS, Intervening Plaintiffs,	)	
	)	NO.
vs.	)	IP. 64-C-101
	)	
ROGER D. BRANIGIN,	)	
EDWIN M. S. STEERS,	)	
THURMAN M. DeMOSS,	)	
As Members of the State Election Board of Indiana, Defendants,	)	
UNITED STATES OF AMERICA, Intervenor.	)	

This action was commenced March 2, 1964 by Nelson G. Grills contesting the constitutionality of the congressional apportionment in Indiana by the Indiana General Assembly. The statute challenged was Chapter 174 of the 1941 Acts of the Indiana General Assembly.



The second phase of the action commenced with the enactment into law of Chapter 205 of the 1965 Acts of the Indiana General Assembly pending Mr. Grills' action. Chapter 205 created new congressional districts. Thereafter, the intervening petitioners entered the pending action and challenged the constitutionality of the new law. This Court adjudged the intervening petitioners were wrong and upheld the constitutionality of the law. Grills v. Branigin, 255 F. Supp. 155. This ruling was vacated by this Court after the United States Supreme Court on January 9, 1967 remanded the case to this Court for further consideration upon the intervening petitioners appealing this Court's ruling. Duddleston et al. v. Grills et al., 385 U.S. _____, 87 S. Ct. 611.

This Court in February of 1967 entered its judgment. Chapter 205 of the 1965 Acts of the Indiana General Assembly was held

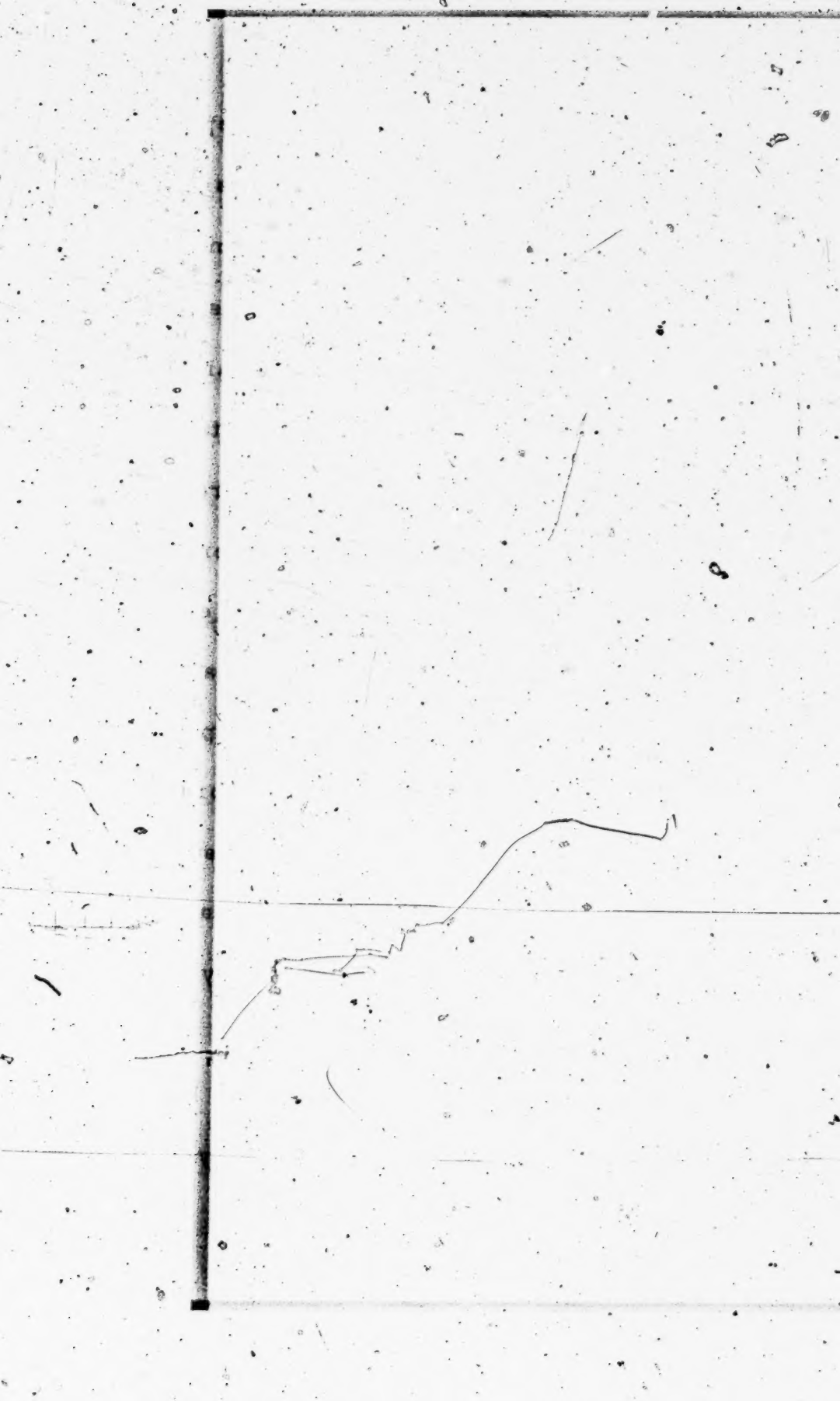
unconstitutional and void by reason of excessive population variances between the congressional districts therein constituted. Chapter 174 of the 1941 Acts of the Indiana General Assembly was also found unconstitutional and void. The defendants and their successors in office were enjoined from conducting elections pursuant to the voided Acts, or any previous Act of the Indiana General Assembly purporting to establish congressional districts for Indiana. The Court retained jurisdiction of the action for the purpose of passing upon any future claims of unconstitutionality made by plaintiffs against any future congressional apportionment adopted by the Indiana General Assembly, if any, and for such other action in the premises as may be necessary.

The Indiana General Assembly was in its regular session at the time of this judgment. It adjourned sine die and no congressional

districting law was enacted although bills were offered, considered and failed to pass. That since the adjournment there has been no further session of said Assembly, nor has the Governor of Indiana issued any call for any special session of said Assembly, nor does he at this time intend to issue any call for any special session. It is highly improbable that said Assembly, if called into session, could agree on any constitutional plan for dividing the State of Indiana into congressional districts. There are vacancies by reason of death and resignation of members of the said Assembly and the Governor of Indiana has not issued writs of election to fill vacancies as provided by Article 5, Section 19 of the Indiana Constitution. If a special session was called, the counties and citizens of these counties in this class action would be unprecedented in the said Assembly session in the creation

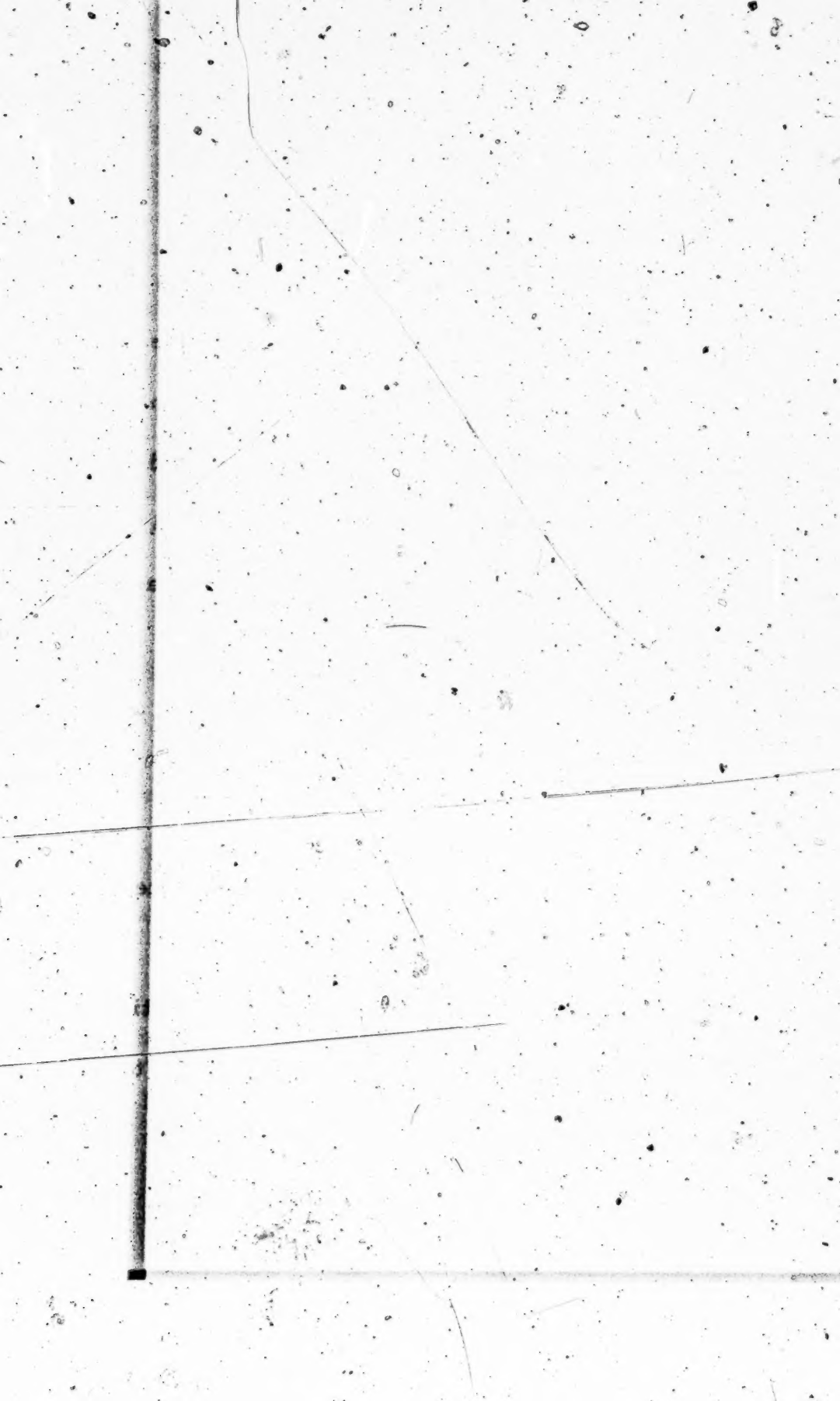
of congressional districts. Without such representation, their right to petition the said Assembly in session under the Indiana Constitution is impaired and less effective than the citizens of other counties with representation in the said Assembly. It appears impossible for the State of Indiana to enact constitutional legislation creating congressional districts in time for the general election of 1968. The time table under the election laws of Indiana for the declaration of candidacy for the nomination for the office of Representative for Congress by districts provides for the filing on February 27, 1968 and within the succeeding thirty (30) days in order for such candidate to be voted upon in the primary on May 7, 1968.

This Court's Judgment of February 1967 enjoined the defendants from conducting any



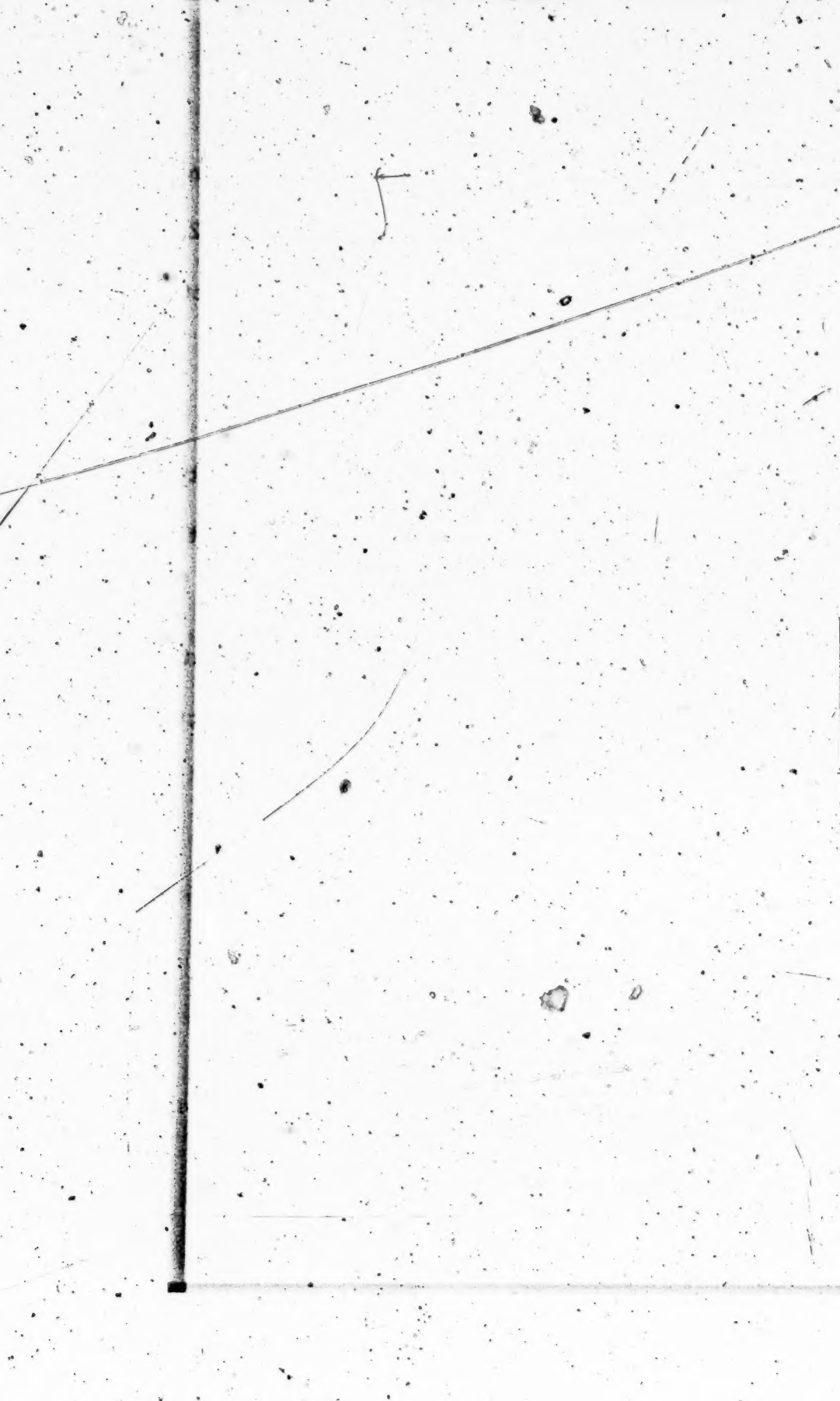
further elections pursuant to Chapter 205 of the 1965 Acts of the Indiana General Assembly and under any prior congressional districting law, and the Court retained jurisdiction of the action for such other action in the premises as may be necessary. The retention of jurisdiction was in accordance with the requests of the plaintiff and original intervening plaintiffs that they be given all such other, further and different remedies as the Court may deem just and necessary in the premises.

The original intervening plaintiffs first noticed the Court of the impasse in the Indiana 1968 election on November 8, 1967 and requested this Court to apportion the congressional districts. Thereafter, they filed supplemental petitions to the same effect together with a motion to advance the cause. The original intervening

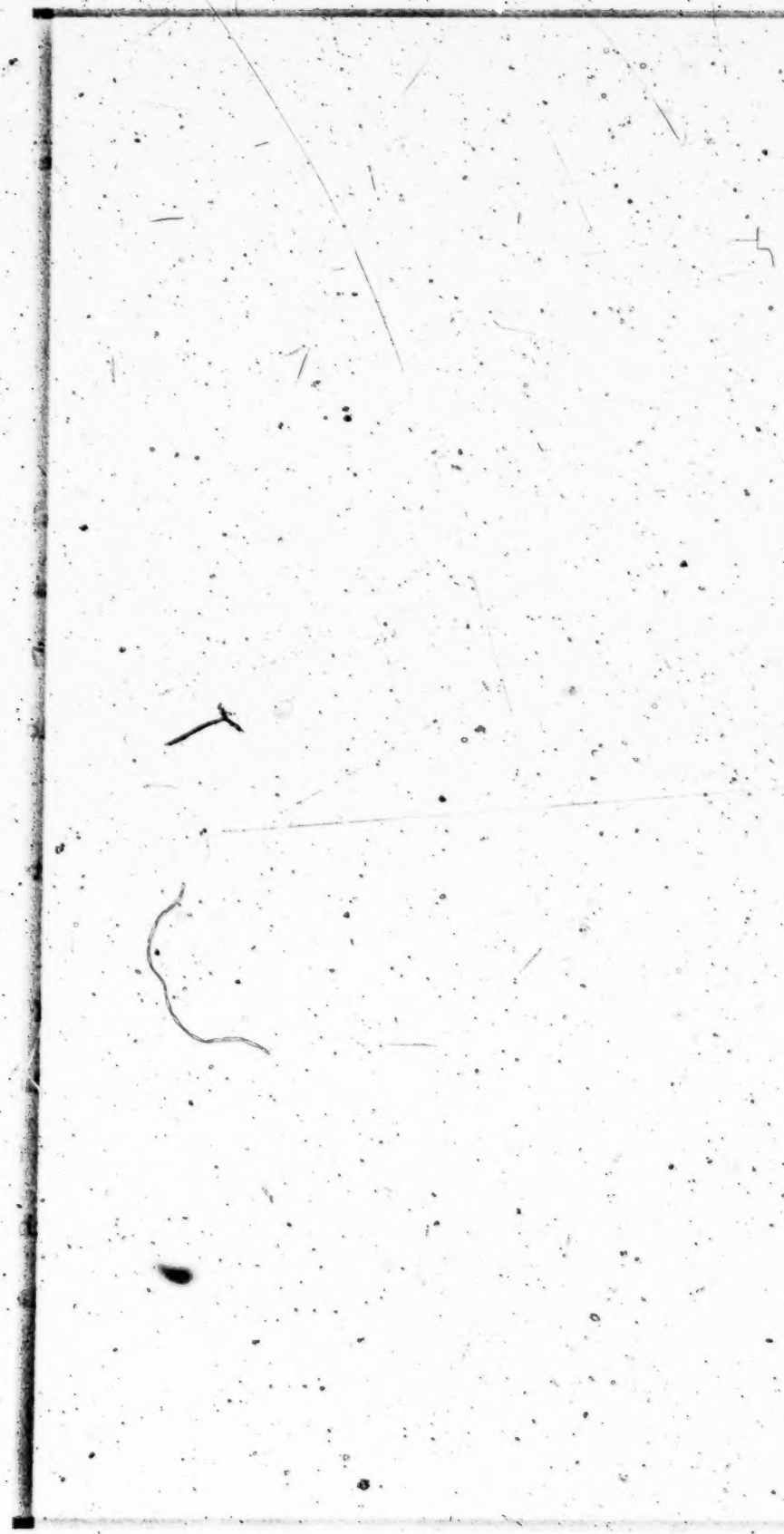


plaintiffs also requested that the December 14, 1967 Public Law 90-196 of the United States Congress (81 Stat. 581, 55 Stat. 761, 2 U.S.C.A. 2a) requiring Indiana to conduct elections by districts and not at large be declared unconstitutional which request is joined in by the original plaintiff. The defendants support the constitutionality of the law. The recent intervenor requests that the elections not be at large. The defendants merely seek instructions of the Court as to what modifications should be made to the void districts of Chapter 205 of the 1965 Acts of the Indiana General Assembly. The defendants do not ask this Court to apportion and do not allege they have the power to do so. The original plaintiff asks that the Court authorize the defendants to apportion Indiana.

Article I, Section 4, Clause 1 of the



United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted to the Indiana General Assembly and the Election Board does not possess the legislative power under the Indiana Constitution nor does it possess judicial power under the Indiana Constitution. In the case of Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795, it was held that Article I, Section 4, Clause 1 of the United States Constitution's reference to the legislature of the several states required complete legislative treatment of a Districting Act which included the approval of the Governor. The legislature of Minnesota had passed a Districting Act which was vetoed by the Governor of that state and the districting of the state by that Act was held not to be in compliance



with the United States Constitution which specifically empowered the legislature to create districts.

It is unnecessary for the Court to reach the issue of constitutionality of Public Law 90-196 approved December 14, 1967 and the requested at large election as Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly is in force and effect and requires districting.

We find that the correct basis for the apportionment of the State of Indiana should be upon the United States Decennial Census of 1960 which is judicially noticed even though it may be a fact that the census is out dated and the communities of the state have grown disproportionately in population. The eleven (11) congressmen apportioned by Congress to the State

of Indiana is based on the census conducted by the United States and not upon any other governmental or private census and cannot be changed until the next United States Census. We think the Census of 1960 must be tolerated until the next official census in order to maintain relative political stability.

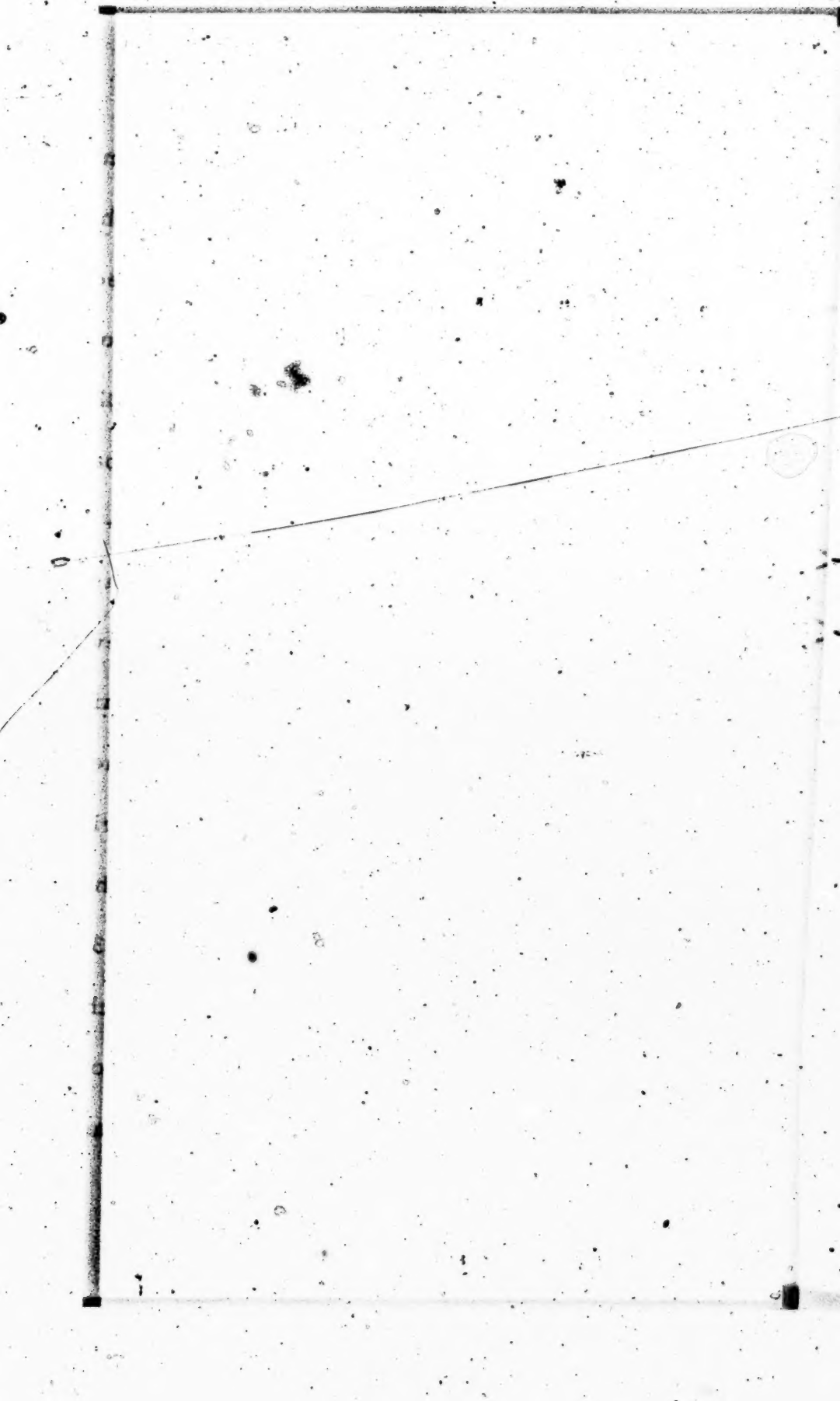
The citizens of Indiana are entitled to immediate relief, and we undertake in the order to follow the apportioning of the eleven (11) congressional districts geographically among the counties and township units of government in Indiana with a minimal variance in population between such districts. The variance is so minimal that it is not deemed practicable, necessary or advisable to sever the county units except in the metropolitan counties of Lake and Marion as each have more population than would to tolerated

in a district. The population of Indiana is 4,662,498 and perfect apportionment would require a district population of 423,863. The districts apportioned have the following population and variances:

District	Population	Pop. Variance	Per Cent Variance
1	427,267	+3,404	+.0080
2	423,227	- 636	-.0015
3	418,220	-5,643	-.0133
4	423,824	- 39	-.00009
5	419,765	-4,098	-.0096
6	428,197	+4,334	+.0102
7	426,620	+2,757	+.0065
8	424,760	+ 897	+.0021
9	425,360	+1,497	+.0035
10	417,158	-6,705	-.0158
11	428,100	+4,237	+.0099

The population overages of the First and

Eleventh Districts total 7,641 and reduce the possibility of a perfect district for the other nine districts by 849 from 423,863 to 423,024. The gross percentage variance based on the perfect district of 423,863 population is computed from the Sixth and Tenth Districts for a total of .0260 per cent. The districts as created are compact and so far as possible follow traditional geographic and congressional districting. It was impossible to retain the composition of the previous districts intact because of the effect of the high variances from the perfect district upon other districts. For example, the Eleventh District was previously comprised of Center Township of Marion County which has a population of 333,351 and Wayne Township of Marion County which has a population of 99,722 for a total district population of 433,073, and an overage of +9,210 and



a percentage of +. 0217. The new Eleventh District retains Center Township, removes Wayne Township from the district and adds the less populated contiguous Townships of Lawrence and Warren in Marion County reducing the variance to +4, 237 for a percentage variance from a perfect district of +. 0099.

The Court having jurisdiction of the parties and subject matter of the action,

IT IS ORDERED, ADJUDGED AND DECREED that all members of the House of Representatives of the United States Congress from the State of Indiana hereafter to be nominated and elected under the election laws of the United States and of the State of Indiana, including any special election, shall be nominated and elected from districts in accordance with Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly. This Court's Judgment of February 9, 1967, declaring

a percentage of +.0217. The new Eleventh District retains Center Township, removes Wayne Township from the district and adds the less populated contiguous Townships of Lawrence and Warren in Marion County reducing the variance to +4,237 for a percentage variance from a perfect district of +.0099.

The Court having jurisdiction of the parties and subject matter of the action,

IT IS ORDERED, ADJUDGED AND DECREED that all members of the House of Representatives of the United States Congress from the State of Indiana hereafter to be nominated and elected under the election laws of the United States and of the State of Indiana, including any special election, shall be nominated and elected from districts in accordance with Section 1 of Chapter 205 of the 1965 Acts of the Indiana General Assembly. This Court's Judgment of February 9, 1967, declaring

Chapter 205 of the 1965 Acts of the Indiana General Assembly to be unconstitutional, was intended only to void Sections 2 through 13 of that Act and insofar as that Judgment of February 9, 1967 may be construed to void Section 1 of that Act it is hereby vacated and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the limits of each district and the territory included therein shall be as hereinafter provided until the Indiana General Assembly shall otherwise provide for districts:

First District. The Townships of Calumet, North and St. John, in the County of Lake, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the First Congressional District of the State of Indiana.

Second District. The Townships of Hobart, Ross, Hanover, Center, Winfield, West Creek, Cedar Creek and Eagle Creek, in the County of Lake, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 and the Counties of Porter, LaPorte, Starke, Newton, Jasper, Pulaski, White, Tippecanoe and Benton shall be and constitute the Second Congressional District of the State of Indiana.

Third District. The Counties of St. Joseph, Elkhart, Marshall and Kosciusko shall be and constitute the Third Congressional District of the State of Indiana.

Fourth District. The Counties of LaGrange, Steuben, Noble, DeKalb, Whitley, Allen, Adams, Wells and Huntington shall be and constitute the Fourth Congressional District of the State of Indiana.

Fifth District. The Counties of Fulton, Cass, Miami, Wabash, Howard, Grant, Blackford, Clinton, Tipton, Boone, Hamilton and Carroll shall be and constitute the Fifth Congressional District of the State of Indiana.

Sixth District. The Townships of Washington, Pike, Wayne, Decatur, Perry and Franklin, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965, and the Counties of Morgan, Johnson, Shelby, Rush and Hancock shall be and constitute the Sixth Congressional District of the State of Indiana.

Seventh District. The Counties of Warren, Fountain, Montgomery, Hendricks, Putnam, Parke, Vermillion, Vigo, Clay, Owen, Monroe, Greene, Sullivan, Martin and Brown shall be and

constitute the Seventh Congressional District of the State of Indiana.

Eighth District. The Counties of Knox, Daviess, Gibson, Posey, Vanderburgh, Warrick, Pike, Dubois, Spencer, Perry, Crawford, Orange and Harrison shall be and constitute the Eighth Congressional District of the State of Indiana.

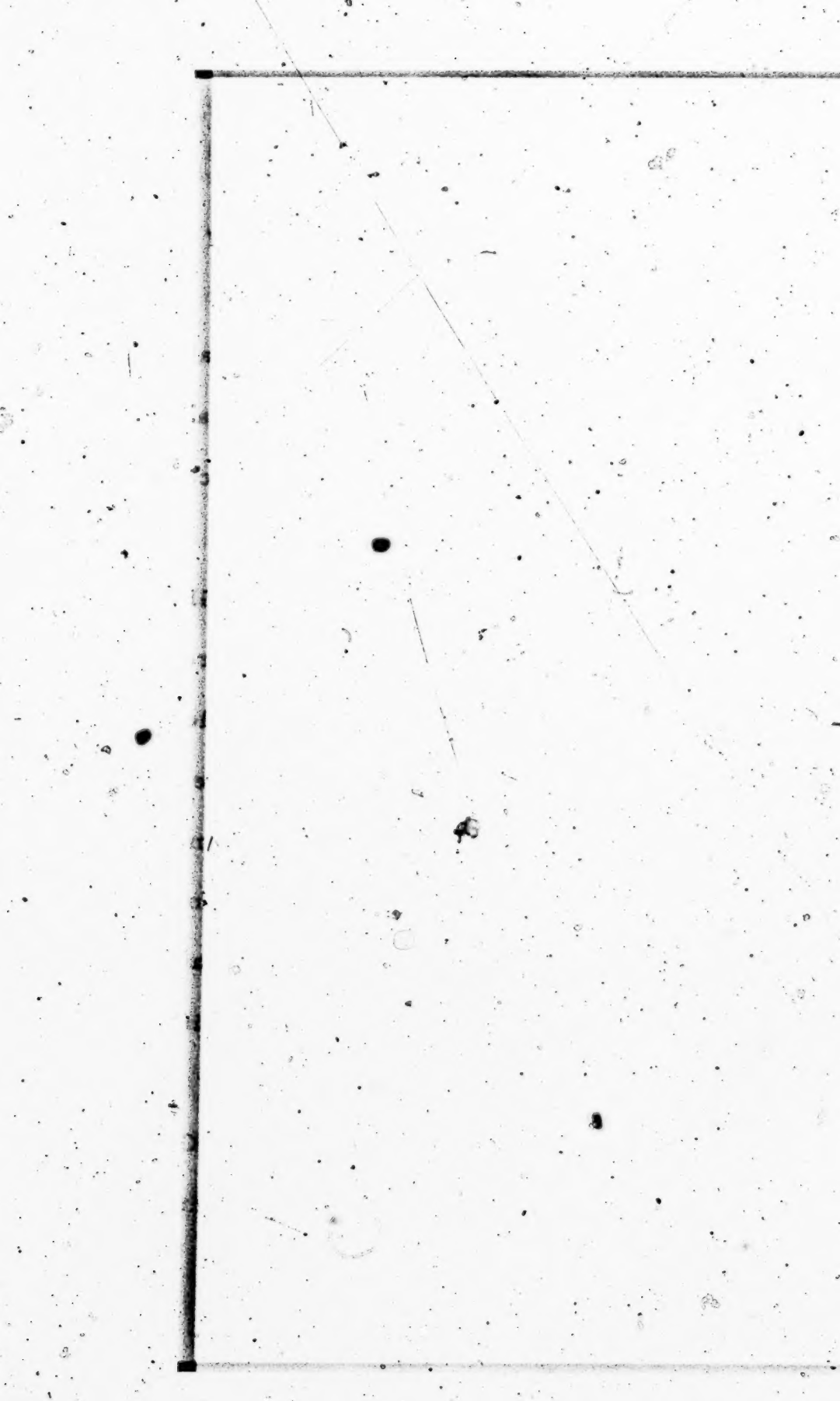
Ninth District. The Counties of Floyd, Clark, Washington, Lawrence, Jackson, Bartholomew, Jennings, Scott, Jefferson, Switzerland, Ohio, Dearborn, Ripley, Franklin, Fayette and Decatur shall be and constitute the Ninth Congressional District of the State of Indiana.

Tenth District. The Counties of Madison, Delaware, Randolph, Wayne, Henry, Jay and Union shall be and constitute the Tenth Congressional District of the State of Indiana.

Eleventh District. The Townships of Center, Warren and Lawrence, in the County of Marion, as those townships existed and their respective geographical boundaries were established and fixed on January 1, 1965 shall be and constitute the Eleventh Congressional District of the State of Indiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, the Secretary of State of the State of Indiana and all election officials of the State of Indiana under the Election Code of Indiana are mandated to conduct all primary, general and special elections for the office of Representative to the United States Congress in accordance with this judgment in the districts created by this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, the Secretary



of State of the State of Indiana and all election officials of the State of Indiana under the Election Code of Indiana be and they are hereby enjoined from conducting any primary, general and special elections for the office of Representative to the United States Congress by the use of districts other than those created by this judgment and by the use of an at large district.

The dissent of our colleague inadvertently would sacrifice factors of judicial apportionment and include factors prevalent in a legislative apportionment which include objective of retention or elimination of incumbent congressmen, splitting counties of one political hue or another, and other considerations inherent in the unconstitutional 1965 legislative apportionment which was accomplished by that Act.

The majority's apportioned districts

achieve the requirements of equality laid down in the Supreme Court Decisions without doing unnecessary violence to the heart of traditional districts, county lines and township lines, including the 1965 Act. Chapter 205 of the 1965 Act of the Indiana General Assembly created only two (2) of the eleven (11) districts within tolerable limits of population. The other nine (9) districts were grossly violative of the tolerable limits of population and necessitated changes. The 1965 Act made gross population shifts from the previous districts established in the 1941 session of the Indiana General Assembly. Some of the districts created by the 1965 Act were not compact. The 1965 Act divided the homogeneous Counties of Floyd and Clark and placed them into two (2) separate districts and the same occurred with respect to the Counties of

Elkhart and St. Joseph. A new legislature has been elected since the 1965 legislature and in their regular session they failed to agree that simple adjustments could be made to the districts created by the 1965 Act of the previous legislature. The present unconstitutional districts of 1965 are not sacrosanct, nor are they steeped in tradition. The United States Census of Population for 1960 presents the additional information that there are nine (9) Metropolitan Statistical Areas. They are the adjoining Counties of Clark and Floyd area, the Vanderburgh County area, Vigo County area, Marion County area, Delaware County area, Lake County area, Porter County area, St. Joseph County area, and the Fort Wayne County area. The Lake and Marion County areas respectively contain substantial population in excess of a would be

perfect district and must be and are divided. The practical effect of these metropolitan centers of population and their homogeneous influence is that they will be and are the heart of any plan of districting.

We have considered the many prior patterns of legislative districts in Indiana which were established in times when the General Assembly of Indiana was not faced with the fundamentals that are now factors of districting. The traditional heart of every district is retained by this Court's districts, however the accretions and separation of some counties from some districts is necessary to meet the present day factors. For example, the Third District as created by the 1941 Act of the Indiana General Assembly was composed of the Counties of LaPorte, St. Joseph, Elkhart and Marshall. In the 1965 session of the Indiana General Assembly, the Third

District was composed of the Counties of LaPorte, St. Joseph, Marshall and Starke with a total population based on the 1960 Census of 384,079 or 39,784 less population than a would be perfect district of 423,863 which was not tolerable. This Court's Third District uses the traditional three (3) Counties of St. Joseph, Elkhart and Marshall and adds the County of Kosciusko. Kosciusko County was a part of the Second District and of necessity had to be separated from the Second District with its accretion of Hobart Township in Lake County and such separation contributes to the compactness of both the Second and Third Districts as constituted by this Court.

The Court does not have the simple facts before it that were present in the case of Klahr v. Goddard, 250 F. Supp. 537 (D. C. Ariz. 1966).

constituted were within constitutionally tolerable population limits. (Districts Five and Nine). The other nine (9) were not within such limits, and, of course, could not all be adjacent to one another. Thus; the Court is faced with a far different problem than merely shifting one (1) county between two (2) adjacent districts. In addition, a new legislature was convened and refused to accept the pattern of the 1965 districting. The adjustments of the 1965 pattern of non-compact districts required the substantial deletion of population from the following districts:

First District overage from perfect district of	+30,345
Second District overage from perfect district of	+ 7,201
Fourth District overage from perfect district of	+27,074
Sixth District overage from perfect district of	+15,098

Eighth District overage
from perfect district of +19,389

Eleventh District overage
from perfect district of +9,210

and the substantial addition of population to the following districts:

Third District underage
from perfect district of -39,784

Seventh District underage
from perfect district of -54,200

Tenth District underage
from perfect district of -17,645

The results of necessarily moving approximately 27,000 population out of the First District as established in 1965 to the Second District (and there was no other place they could go) with an overage of approximately 7000 population as established in 1965 makes the Second District with an overage of approximately 33,000 population and some population had to be removed therefrom to another. The

problem was multiplied nine (9) times as the above underages and overages of the 1965 districts disclose. The net result of developing the districts is similar to the example of the domino game when one (1) standing domino falls many more are affected by the tumbling domino. In addition counties are not composed of uniform population and vary greatly.

We cannot agree with out colleague in dissent in his attempted adherence to the 1965 pattern of districts. The majority chooses to adhere to the traditional heart of the districting pattern of Indiana insofar as it is reasonable and effect practical homogeneous compactness and as related to the Metropolitan Statistical Areas of the 1960 Census. Any other consideration includes the forbidden factor of entering the political thicket of which Justice Frankfurter

warned in the case of Colegrove v. Green, 66 S.Ct. 1198, 328 U.S. 549, 90 L.Ed. 1432 (1946). Unlike the unconstitutional apportionment of the 1965 Act of the Indiana General Assembly, the majority's apportionment does not pit an incumbent congressman against another of the same political party and does not indulge in grotesque geographical alignment of counties to accomplish such a result. The unplanned results of the majority's districts which adhere to Indiana's historical patterns, tolerable population variances and compactness of a judicial apportionment has resulted in the avoidance of such inference in that no incumbent congressman is pitted against another of the same political party and in only one (1) instance is an incumbent congressman of one (1) party pitted against another of the opposite party. The majority

believes Indiana will be best served with the compactness of the districts created.

The dissent's reference to the summary total of the relocated population of all of the eleven (11) districts of the majority's districting is eye catching but is not based upon any constitutional or legal principal anymore than the summary of the total variances of the eleven (11) districts from a perfect district would be. No legislative apportionment has been rendered unconstitutional by the addition of the variances of all districts in a state, nor by the relocation of population. The statistics of necessary population shifts are further exampled by the absolute necessity of moving the entire population of Hobart Township in Lake County (consisting of 39,223) out of the First District into the Second District as created by the 1965 Act of the Indiana General Assembly and moving the entire

population of St. John Township of Lake County (consisting of 12,282) out of the Second District into the First District for a total population change of 51,505 to rehabilitate the invalid apportioned First District. This overloaded the Second District by approximately 33,000 population (now we have approximately 84,505 relocations) and it was surrounded by the Third and Seventh Districts with substantial underages in population totaling 93,984; the Fourth District with an overage of 27,074; the Fifth District with an overage of 2,245; and the Sixth District with an overage of 15,098. What county or counties from the perimeter of the Second District containing 33,000 population can be moved to the Third or Seventh Districts? We found no such simple solution. Bordering these districts a similar problem existed. Another example is

the Eleventh District as created in 1965 with an overage in population of 9, 210 and to diminish this overage one of two (2) townships (Wayne containing 99, 722) of the two (2) township district had to be moved to another district. Hence the computation of relocated population is of no legal significance. The 1965 legislative apportionment was conceived in violation of the law, the districts were so grossly apportioned and so geographically grotesque, that the argument of relocation of population is laid upon an unsound base.

Dated this 14 day of February, 1968.

/S/ Win G. Knoch
Win G. Knoch, Judge, U. S. Circuit Court of Appeals for the Seventh Circuit, Designated Member of the Three-Judge Trial Court

/S/ Cale J. Holder
Cale J. Holder, Judge, U. S. District Court, Designated Member of the Three-Judge Trial Court

[Irrelevant detail shown on the Court's map omitted from this copy.]

INDIANA 1960 CENSUS POPULATION 4,662,498
PERFECT APPORTIONED DISTRICT POP. 423,863

FIRST DISTRICT IS COMPOSED OF CALUMET TOWNSHIP, NORTH TOWNSHIP, ST. JOHN TOWNSHIP OF LAKE COUNTY.

ELEVENTH DISTRICT IS COMPOSED OF CENTER TOWNSHIP, WARREN TOWNSHIP, LAWRENCE TOWNSHIP OF MARION COUNTY.

SIXTH DISTRICT INCLUDES WASHINGTON TOWNSHIP, PIKE TOWNSHIP, WAYNE TOWNSHIP, DECATUR TOWNSHIP, PERRY TOWNSHIP, FRANKLIN TOWNSHIP OF MARION COUNTY.

DIST.	POP.	PERFECT DIST. POP. VARIANCE	PERCENTAGE POP. VARIANCE
1	427,267	3,404+	.0080+
2	423,227	636-	.0015-
3	418,220	5,643-	.0133-
4	423,824	39-	.00009-
5	419,765	4,098-	.0096-
6	428,197	4,334+	.0102+
7	426,620	2,757+	.0065+
8	424,760	897+	.0021+
9	425,360	1,497+	.0035+
10	417,158	6,705-	.0158-
11	428,100	4,237+	.0099+

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NELSON G. GRILLS, Plaintiff, DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY, Intervening Plaintiffs, JOSEPH W. SUMMERS, Intervening Plaintiff,	)
-vs-	) NO. IP 64-C-101
ROGER D. BRANIGIN, EDWIN M. S. STEERS, THURMAN M. DeMOSS, As Members of the State Election Board of Indiana, Defendants.	)

CORRECTED AND SUPERSEDING
DISSENTING OPINION

I respectfully dissent from so much of the majority opinion as purports to mandate the defendant members of the State Election Board of Indiana, and others not parties to this action, to conduct elections for the office of

representative in the Congress of the United States from the State of Indiana from eleven districts created by them. I agree that the defendants should be instructed as to how such elections should be conducted, in accordance with their prayer; and I further agree that this court has jurisdiction to, and should do so. It is not, however, constitutionally permissible for this court to enter the political arena as the majority has done, and to impose upon the powers of a coordinate political department, the General Assembly of Indiana, by adopting a districting scheme of its own devising, bearing no reasonable relationship to the plan last adopted by the General Assembly.[1]

1. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for

The plain error into which the majority has fallen is that it has misconceived the failure of the politically divided General Assembly to enact a new districting plan to have somehow given carte blanche to this court, or to a majority thereof, to usurp all legislative prerogatives; and to attack the problem as if Chapter 205 of the Acts of 1965 (hereafter "Chapter 205") had never been enacted. But such is not the law. On the contrary, all courts which have

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1(contd.)
resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestionable adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."
Baker v. Carr, 1962, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663, 686.

spoken on the subject have unanimously held that the judicial power is limited to reviewing the last (albeit unconstitutional) legislative act, and to making such corrections as are necessary to bring it into conformity with the "one man, one vote" principle.[2] This must be so, since it has long been the law that the courts have no power to perform administrative acts.[3]

I now consider the plan of the majority to determine whether it exceeds the bounds of

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2. Maryland Committee for Fair Cong. Redist. v. Tawes, D. Md., 1966, 253 F. Supp. 731, aff'd. sub nom. Alton v. Tawes, 384 U.S. 315, 16 L. Ed. 2d 586; Klahr v. Goddard, D. Ariz., 1966, 250 F. Supp. 537; People v. Kerner, 1965, 33 Ill. 2d 460, 211 N. E. 2d 736.

3. O'Donoghue v. United States, 1933, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356; Old Colony Trust Company v. Commissioner of Internal Revenue, 1929, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 918.

necessity. According to the districting adopted by Chapter 205, three districts contained less than the optimum population of 423,863, by a total of 111,629 persons;[4] the other eight districts therefore had a similar total overage. It is apparent that if available census information is sufficiently detailed in its "building blocks" to enable the transfer of 111,629 persons from the eight larger districts to the three smaller districts in proper ratio, all districts may thus be made to conform completely to constitutional commandments. But the majority plan moves a total of 1,215,606 persons from districts created by Chapter 205 to other districts![5] This gross deviation of more than 1,000 per cent demonstrates beyond a doubt that the majority plan is not an objective one of

4. Table I, Appendix
5. Table II, Appendix

necessary correction, but rather is an original and novel plan conforming only to the subjective impulses of the majority.

It is true that the majority, after juggling approximately one-fourth of the total population of the State, has created eleven districts more balanced in population than those created by Chapter 205. But to do this, they have impermissibly taken what I shall call the "chain reaction" approach. Using this method, they have moved whole counties from districts already in close balance as created by Chapter 205 to other districts already overpopulated. This, of course, magnifies the problem already existing in the overpopulated districts, and requires the majority to remove from such districts more population than would have been required in the first instance. This goes on in

chain reaction from until the aforementioned total of 1,215,606 people and 26 out of 92 whole counties have been rearranged. As an example, the 5th District, as created by Chapter 205, was overpopulated by only 2,247 persons; to correct this district to perfection, therefore, would have required only that 2,247 persons be moved to an adjoining, underpopulated district, such as the 10th, and that no population be added. But the majority has completely reconstructed the 5th District by moving out of it the whole counties of Adams, Wells, Jay, Madison and Huntington,[6] and by moving into it the counties of Wabash, Fulton, Carroll, Cass, Clinton, Boone, Tipton and Hamilton. Of the original Chapter 205 district, only the counties of Miami, Howard, Grant and Blackford (total

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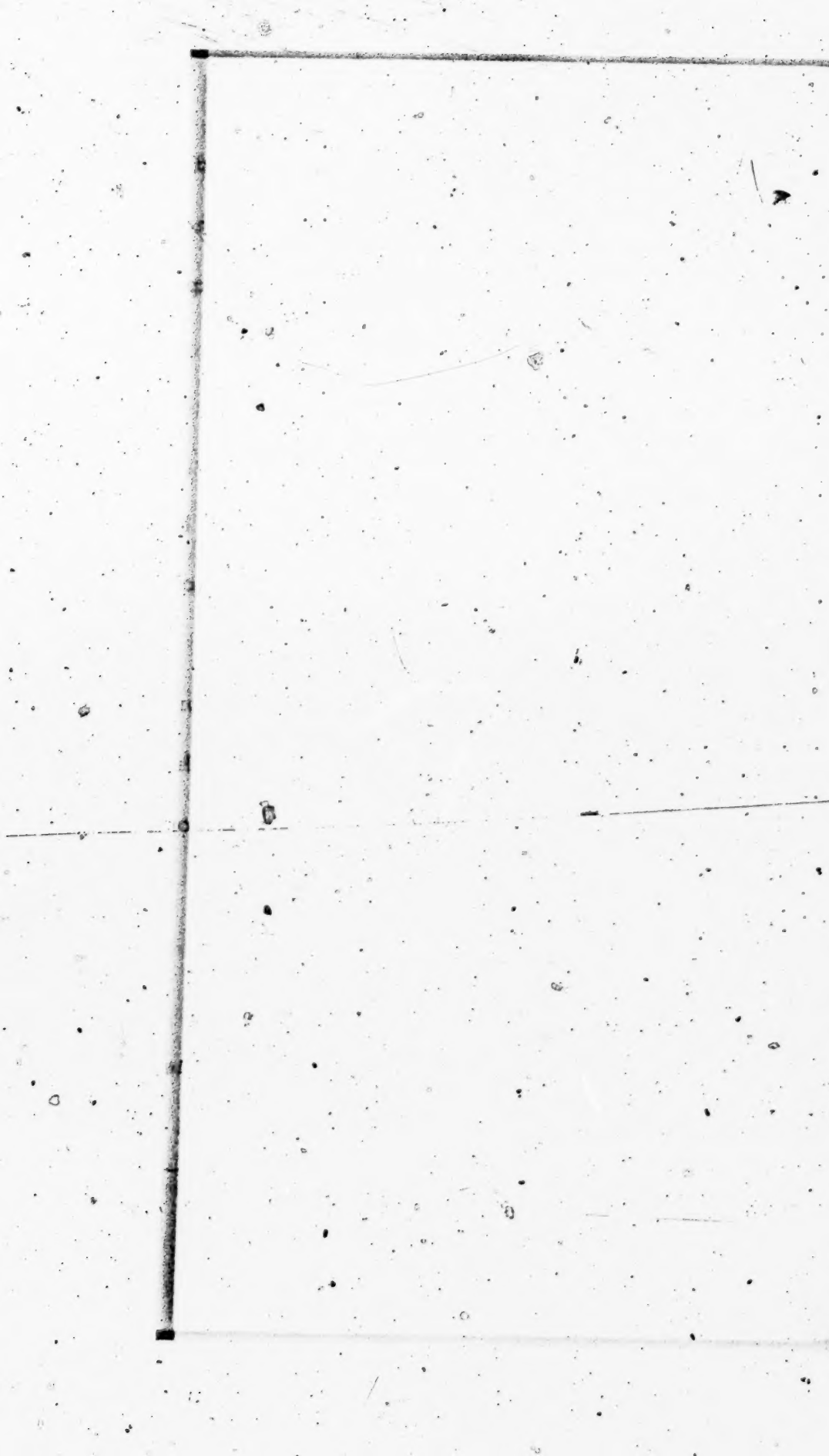
6. Map attached to Table II, Appendix



population 198,042) remain constant!

The census figures are in sufficient detail to enable a court to correct the districting adopted by Chapter 205 to within approximately 100 votes per district, and in fact I have done so.[7] My corrected plan has a maximum deviation of plus 118 in the 4th District and minus 93 in the 2nd District. The ratio of the largest to the smallest district in terms of population may thus be computed as 1.00056 to 1. Of equal importance, all corrections have been made in a constitutional rather than a random fashion in that the shifts invariably go from overpopulated districts to underpopulated districts, with one unavoidable exception, so as to disturb Chapter 205 boundaries by the absolute minimum.

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7. Table III, Appendix

In accomplishing this result, I of course commence with the districts as laid out by Chapter 205.[8] The 1st District is overpopulated by 30,345, and must be corrected by the removal of approximately this number. The 1st District is contiguous only to the 2d District, so that the movement must be to that district, although it is already overpopulated by 7,201. This is the one unavoidable exception referred to in the preceding paragraph, wherein population is moved into an already overpopulated district. It is for this reason that it must be corrected first. By inspection of the census tracts and enumeration districts in the 1st District, I find a bloc of 30,297 persons in a geographic

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8. Map attached to Table I, Appendix

area contiguous to the 2d District,[9] and correct the 1st District by moving such bloc to the 2d District, which now becomes overpopulated by a total of 37,498. All further movements will be direct from overpopulated to underpopulated districts.

The 2d District adjoins two underpopulated districts, the 3d and the 7th. Looking ahead, we perceive that the 4th District is overpopulated, and adjoins the overpopulated 2d, 5th and the underpopulated 3d. The 4th may, therefore, only move its surplus into the 3d, whereas the 2d may move either to the 3rd or to

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9. The geographic area is in the southern part of Hobart Township, as follows: Census Tract HOT 56, population 16,934; Census Tract HOT 58, population 8.752; Census Enumeration Districts 16-N, 16-P, and East Gary 2, 3, 7 and 8 in Census Tract HOT 57, total population 4,611. (Metes and bounds descriptions set out in Table IV, Part 2, for areas other than counties and townships)

the 7th. We therefore first correct the 4th, by moving an area in Elkhart County,[10] population 26,956, into the 3d. The 3d is still underpopulated, so we correct it completely and correct the 2d in part by moving townships in Porter, Jasper, Pulaski and Fulton Counties,[11] population 12,760, into the 3d. We now complete the correction of the 2d by moving the townships in Benton and Tippecanoe Counties,[12] population 24,831, into the 7th. Correction of the 7th

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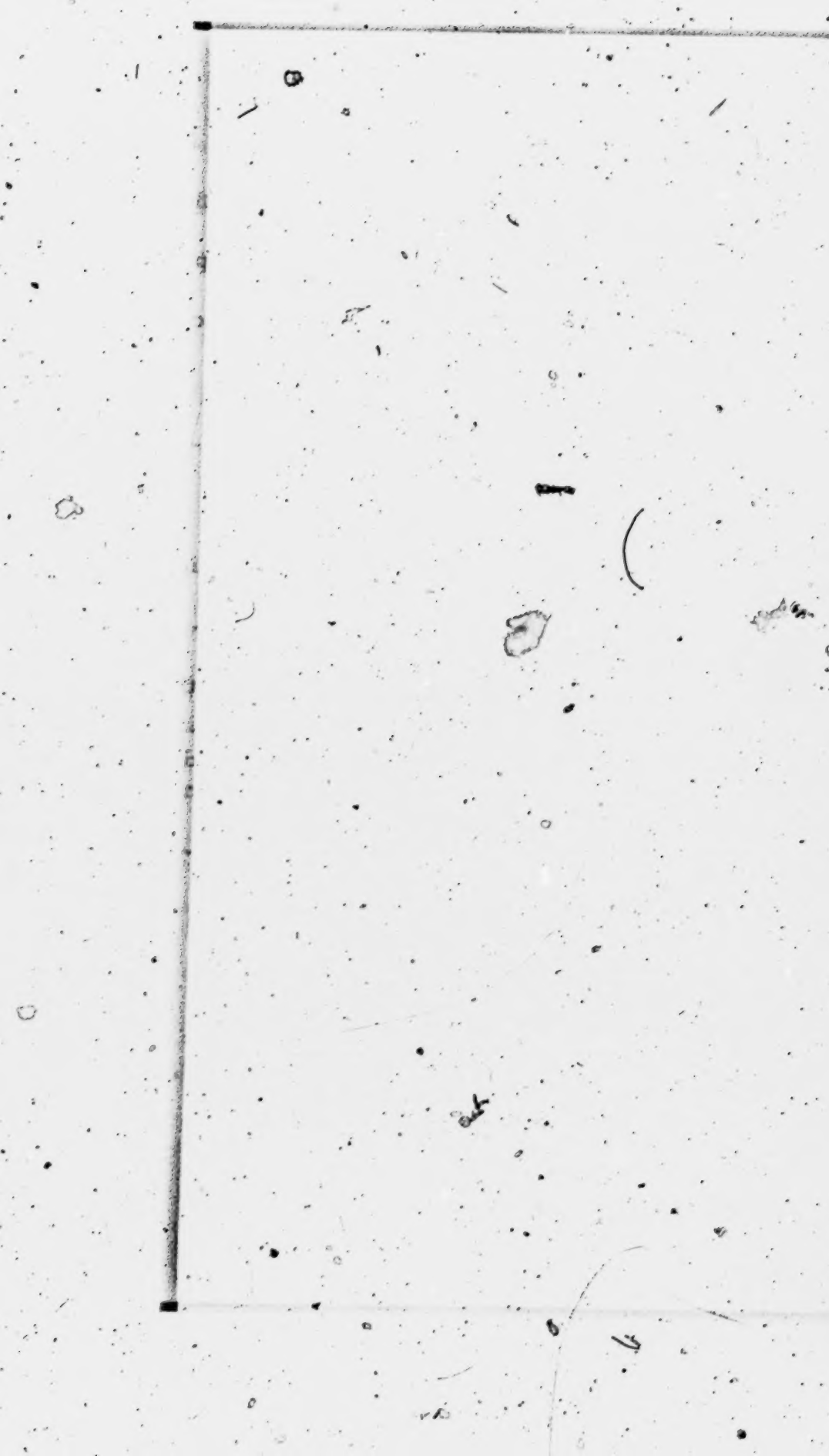
10. Cleveland and Baugo Townships, combined population 7,206, and Census Enumeration Districts 8-N, 9-N, 10-19, inclusive, 29, 34, 35, 36 and 38-N, all in Concord Township in the City of Elkhart, containing a population of 19,750.

11. For townships see Table III.

12. All of Benton County, except Union Township thereof, population 11,372; Townships of Jackson, Lauramie, Randolph, Sheffield, Shelby, Union, Wayne and Wea of Tippecanoe County, total population 13,459.



is continued, and at the same time the 8th is corrected completely by moving Martin County and townships off of the north part of Knox County,[13] total population 19,277, from the 8th to the 7th. Correction of the 7th is completed by the transfer to it of certain townships of Hendricks and Morgan Counties,[14] population 10,196, from the overpopulated 6th. Correction of the 6th is completed by transfer of a population of 4,921 out of Warren Township of Marion County[15] to the underpopulated 10th.

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[13] Widner, Vigo and Steen Townships.

[14] Franklin and Clay Townships of Hendricks County, total population 2,977; Adams, Ashland, Clay, Gregg and Jefferson Townships of Morgan County, total population 7,219.

[15] The geographic area transferrred is a part of Warren Township of Marion County, being Census Enumeration Districts 137-P, 138-P, 138-R, 427, 428-N, 428-Pa and 428-Pb, all in Census Tract 601, and containing a total population of 4,921.

Finally, the 5th,[16] 9th,[17] and 11th[18] are each corrected by transfers into the 10th, which is finally corrected thereby.

The corrections above set out are the only proper ones. It is immaterial whether the adjustments are made in the precise order in which I have listed them for illustrative purposes, or in some other order. It is required that the 1st District be adjusted first, to avoid impermissible and unnecessary "chain

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[16] Jackson Township of Blackford County, population 1,527, and Union Township of Howard County, population 769.

[17] Fugit Township of Decatur County, population 1,071.

[18] The geographic area transferred is a part of Center Township of Marion County, contained in Census Tract 506, Census Enumeration District 194 of Census Tract 523, and Census Enumeration District 123 of Census Tract 507, containing a total population of 9,274.

reaction" transfers. But once this correction is made, it is absolutely immaterial whether the next district adjusted is the 8th, the 11th, the 5th, or any other district. If the rule of avoiding unnecessary transfers is observed, the results must be the same.[19]

The majority adopts the argument found wanting on the first appeal of this case,[20] to the effect that their new plan is better than the one it would supersede. But they can not prevail on this basis, as their maximum variance between

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[19] e.g., Assume starting with the overpopulated 8th: the transfer must be to the 7th, because the other adjacent district, the 9th, is also overpopulated; the only underpopulated district touched by the overpopulated 5th and 11th is the 10th, so their transfers must be to it, etc.

[20] Duddleston v. Grills, 385 U.S. 455, vacating and remanding Grills v. Branigin, S.D. Ind., 1966, 255 F.Supp. 155; cf. Swann v. Adams; 385 U.S. 440, 87 S.Ct. 569.

overpopulated and underpopulated districts is 11,039 – or approximately fifty times higher than my variance of 235. However, I do not argue the numbers game; I simply point out the figures. They attempt the further justification that they do not split counties. But there is nothing sacred about a county, or for that matter a township or a city. These political subdivisions of the State exist purely for i convenience for the purpose of assessing and collecting ad valorem taxes, and performing various administrative chores. The constitutionality of splitting political subdivisions has been established by the decision of the Supreme Court of the United States affirming such a plan;[21] hence the excuse advanced by the

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[21] Alton v. Tawes, 384 U.S. 315, 16 L. Ed. 2d 586, affirming Maryland Committee for Fair Cong. Redist. v. Tawes, D. Md., 1966 253 F. Supp. 731

majority for their plan is not a satisfactory explanation for their curious moving from district to district of approximately 25 per cent of the population of the State.

I must therefore dissent from that which I firmly believe to be the unconstitutional assumption of a power vested exclusively in the General Assembly by Article 1, Section 4 of the Constitution by a court which further lacks the jurisdiction to do so by reason of the limited powers granted to it by Article 3, Section 2 of the Constitution. The action of the majority is thus doubly unconstitutional, if such a thing be possible.

My dissenting opinion, filed February 14, 1968, contained an error in my suggested correction of the 3d District. I have therefore revised the townships to be transferred from

the 2d to the 3d District, and the appropriate tables. The corrected opinion is republished in its entirety, in the interest of clarity, and therefore supersedes completely the original opinion.

Dated this 26th day of February, 1968.

/S/ S. Hugh Dillin
S. Hugh Dillin, Judge,
U.S. District Court,
Assigned Trial Judg
and Member of the Three-
Judge Trial Court